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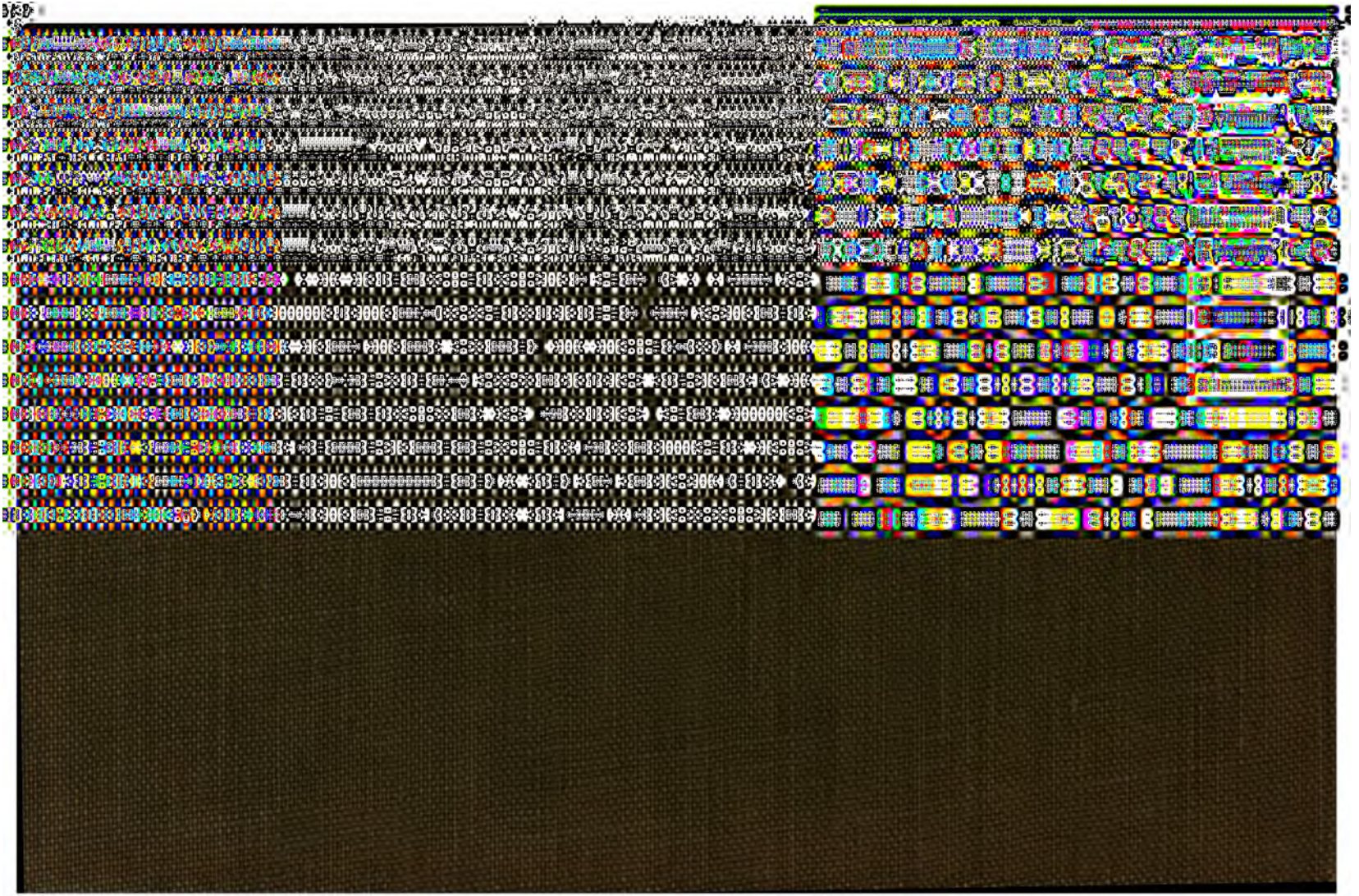

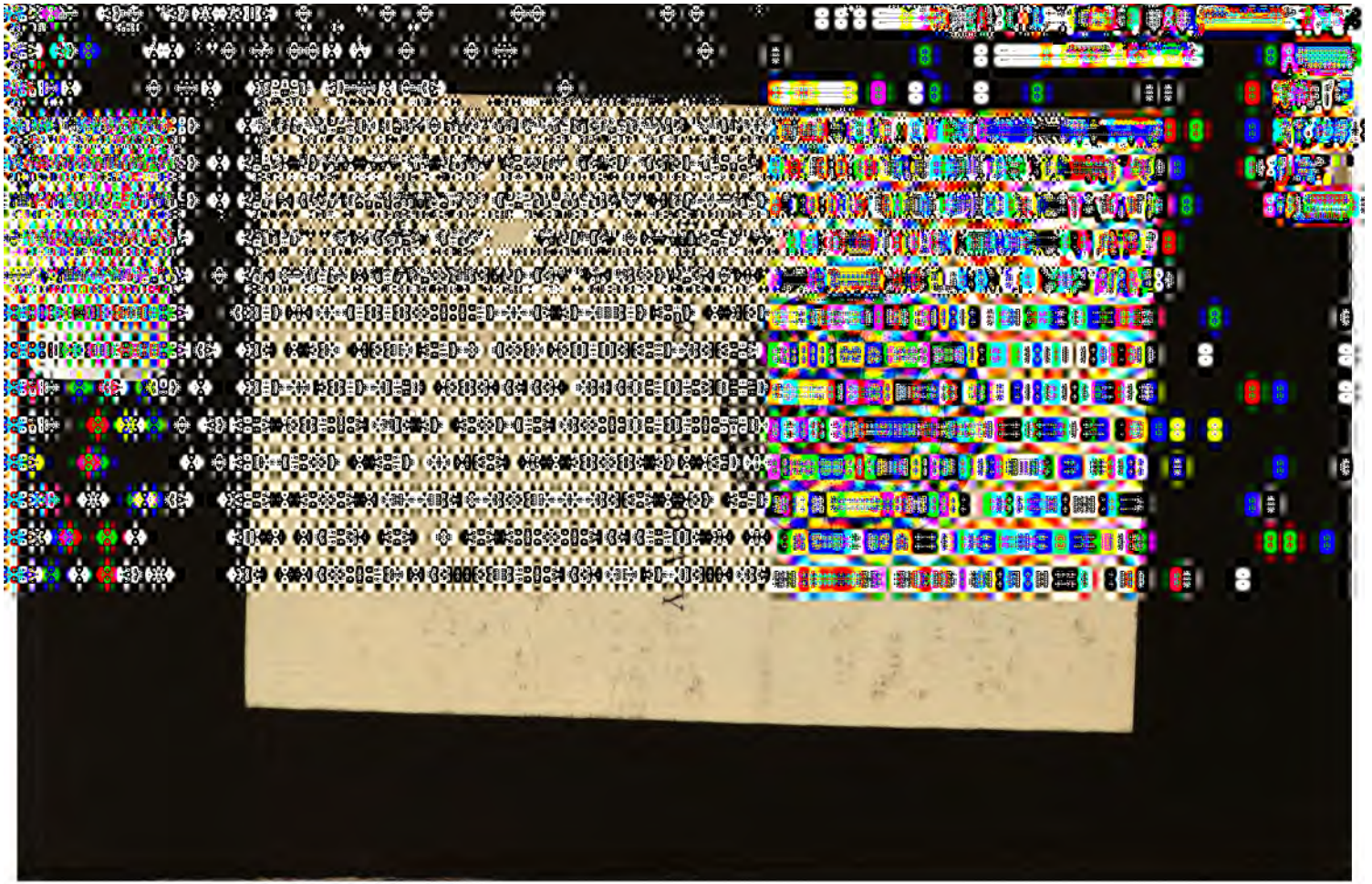

# MILITARY LAW

AND THE

# PROCEDURE OF COURTS-MARTIAL

BY

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# PREFACE

THIS book has been prepared to meet the existing necessity at the United States Military Academy for a text-book which would give a clear and thorough outline of the science of military law, including all recent changes and developments, and yet be contained within such brief compass as to be adapted for use in the instruction of Cadets within the limited period assigned to the study of the subject. The work also aims to deal with the general procedure of courts-martial and to set forth that procedure and existing military laws in such a manner as to make a text of practical use to the service at large.

The author wishes to acknowledge the constant and valuable assistance received from the Assistant Professor and Instructors in the Department of Law at the Military Academy, who, during the past year, have given instruction in the text as tentatively prepared and have made suggestions and criticisms which have resulted in a clearer and better presentation of the subject matter and the elimination of some errors.

These officers are: Captain J. K. Moore, 15th U. S. Infantry, Assistant Professor; First Lieutenants Irvin L. Hunt, 19th Infantry; Halsey E. Yates, 5th Infantry; Edwin G. Davis and Edward Canfield, Jr., Artillery Corps. It is desired to include in this acknowledgment the assistance in revision and correction of the work received from

First Lieutenant S. T. Ansell, 11th Infantry, since detailed as an Instructor in the Department.

The author is greatly indebted to General George B. Davis, Judge-Advocate-General United States Army, for his encouragement and advice, and to the text of his more extensive work on Military Law, from which authority many quotations have been made; also, for an examination and review of this work, to General J. W. Clous, Judge-Advocate-General United States Army, retired, whose long experience in the service, and as Professor of Law at the United States Military Academy from 1890 to 1895, gives especial value to his criticism and suggestions.

WEST POINT, N. Y., December, 1906.

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## PREFACE TO THE SECOND EDITION.

MANY changes have been made within the last two years through the passage of new laws, the decisions of courts, the issue of new Army Regulations and of a new Court-martial Manual. The original text has, therefore, been completely revised to bring it into conformity therewith. New matter has been introduced, the Forms made to correspond to those now authorized, and a "Table of Cases Cited" has been added, thus making the work as complete and accurate as possible to this date.

WEST POINT, N. Y., December, 1908.

# PREFACE TO THE THIRD EDITION.

CONGRESS, by the Act of March 4, 1909, enacted penal laws which repeal or modify many sections of the Revised Statutes of the United States relating to criminal offenses. This work has, therefore, been revised and corrected to conform to these new laws, and also to embrace the most recent decisions of the courts, or other authorities, and the orders of the War Department, which affect the text, or the Forms appearing in the Appendix.

JOHNSTOWN, N. Y., January 1, 1910.

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## ABBREVIATIONS

| | |
|---|---|
| A. R. | Army Regulations, Edition 1908. |
| Art | Articles of War. |
| Court-martial Manual | Manual for Courts-martial, Edition 1908. |
| Dig. Op. J. A. G. | Digest Opinions Judge-Advocate-General, U. S. Army, Edition 1901. |
| R. S. | Revised Statutes U. S. |

# MILITARY LAW

AND THE

# PROCEDURE OF COURTS-MARTIAL

## CHAPTER I

### MILITARY JURISDICTION; MILITARY LAW; MILITARY GOVERNMENT; MARTIAL LAW

1. **Jurisdiction.**—Jurisdiction, in its most general sense, is the power to make, declare and apply the law. The jurisdiction of a state is its sovereign power to govern or legislate, and to exercise its authority within its territorial limits.[1]

2. **Military Jurisdiction** is the power to make, declare and apply the law pertaining to the military forces of a nation in all its forms of action and operation. It is applicable not only to persons in the military service and to those conditions of their service which impose upon them duties with regard to persons not ordinarily subject to military jurisdiction, but it also governs other persons, under circumstances which place them within the sphere of military operations, making them subject thereto,—as in the field of operations in time of war, or during the existence of serious domestic disturbances at any time.

[1] U. S. v. Bevans, 3 Wheat. (16 U. S.) 386 et seq.; R. I. v. Mass., 12 Pet. (37 U. S.) 733.

Military jurisdiction includes, then, not only military law proper, as applied to persons in the military service, but also military government and martial law, each of which has its proper place in relation to the other and to the government and conduct of armed forces and of those persons subject, for the time being, to its control.

3. **Military Law** in its strict sense, as used in this text, is that law which governs all persons in, or legally belonging to, the military establishment of the nation and which is in force at all times, in peace or in war,[1] and in all places, at home or abroad.

The general term "military law" has often been used as synonymous with "martial law" and also to include the "law of military occupation"; but this use of the term is incorrect; each of these terms has its own definite and proper meaning and construction to be given it.

4. **Military Government,** or the "government of military occupation," is the government established by a commander over occupied enemy's territory and is therefore within the domain of international law and the laws of war. It is, in fact, the will of the Chief Executive of the nation exercised through the commander of the occupying military forces. It exists in conquered or occupied territory where civil authority has ceased, and all the functions of government, legislative, executive, and judicial, are for the time being united in the powers of the military commander, and are exercised by him under the authority, and as the representative, of the Chief Executive of his nation. The enemy's territory may be either foreign conquered territory, or territory within the state held by rebels who are recognized as belligerents.

5. **Martial Law** is that rule by the military power which, as a result of public exigency or military necessity, may be exercised in time of war, insurrection or rebellion,

[1] See par. 771, post.

in parts of the country retaining their allegiance, over persons and things not ordinarily subject to such rule; and also, in time of war, insurrection or rebellion, it is the law applicable to persons in the military service with regard to acts or obligations arising out of such emergency not falling within the domain of military law, nor otherwise regulated by law.[1] When exercised in domestic territory, it is limited to, and proclaimed only in, those places where civil authority has ceased to exist and the ordinary civil processes and functions must necessarily be replaced by the strong and arbitrary power of military authority exercised within the limit of a sound discretion and under a sense of future responsibility.[2]

Whenever the necessity for its existence ceases and civil functions are resumed, martial law disappears, the military being always subordinate to the civil in time of peace when civil powers are unrestrained.

**6.** Military law has its code, or statute law, and its common or unwritten law consisting of recognized usages and customs of the service.

Military government has no code; the governing power is simply the will of the commander exercised according to, and controlled by, the usages, customs and laws of war as recognized by all civilized nations.

The military commander, while not responsible to the courts of the occupied territory, may be required to answer for any illegal, arbitrary or unjustifiable acts by the authorities of his own country. But if his acts, done in his official capacity, have been directed or authorized by his government, or, even though in excess of his authority, are afterward ratified by it, they then become the acts of the government, and he is relieved from responsibility therefor.[3]

[1] Court-martial Manual, p. 5.
[2] See Mitchell v. Harmony, 13 How. (54 U. S.) 115.
[3] See par. 660–667, post.

Martial law is also the will of the military commander, but the acts of such commander are always subject, after the exigency is over, to come directly under the cognizance of the civil authority of the state, and he may be held liable in its courts for any act of injustice arising from arbitrary conduct or unjustifiable use of his powers. His whole duty is to regulate the disorder prevailing and to restore the civil authority to power just as soon as practicable, meanwhile conducting the affairs of the disturbed region according to his best judgment for the benefit of all its inhabitants and their rights, and with justice to all.[1]

[1] See par. 668–678, post.

## CHAPTER II

### MILITARY LAW

**7.** "Military Law in the United States consists of the Rules and Articles of War and other statutory provisions for the government of persons subject to military control, to which may be added the unwritten or common law derived from the usages and customs of military service."

#### ORIGIN OF OUR MILITARY CODE

**8.** The Rules and Articles of War for the government of the armies of the United States were derived from those of the English army which were in force when the British troops were in the colonies just prior to the American Revolution.[1]

[1] Many colonists had served with the British troops in the French and Indian wars; some of them were also engaged in the capture of Havana, Cuba, in 1762, and they were, therefore, acquainted with the rules and regulations in force for the government of the English army.

The laws governing that army had been derived from articles of war prescribed by the sovereign and a long series of enactments, the first being enacted by Parliament as the "Mutiny Act" in 1689 and so called until, in 1879, the Articles were merged with it and the name of Army Discipline Act given to the result. This was re-enacted in 1881 as the "Army Act," which name it still retains with the addition of the year in which it was passed, being re-enacted annually; Parliament thus retaining control over the military establishment.

For the full history of the development of the military law of England, see "Summary of Military Law" by Story; "Manual of Military Law of England, War Office, 1894"; and "Davis' Military Law." The latter also contains, in the Appendix, "The Prince Rupert Articles," 1673; "The British Articles of 1774"; "The American Articles of 1776, of May 31, 1786, and of April 10, 1806."

9. The original American Articles of War were adopted from the British Articles and the laws governing the British army at that time, by resolution of the Continental Congress, June 30, 1775. A new code was substituted September 20, 1776, which was amended in 1786. and by the act of September 29, 1789, those rules previously established were recognized and continued in force under the Constitution. These Articles were rearranged. modified and promulgated by Act of Congress of April 10, 1806, and continued in force with a few modifications until the Act of June 22, 1874, and were later included as Sec. 1342 of the Revised Statutes of the United States of 1878. Various amendments have been made, but there has been no complete revision thereof, and, as amended from time to time, these Articles are still (1908) in force.[1]

10. Congress derives the power to enact rules for the government and regulation of the Army from the 8th section of Article I of the Constitution, and in exercise of that power has enacted the Articles of War, Revised Statutes, Sec. 1342.[2]

### ARMY REGULATIONS,[3] ORDERS, ETC.

11. In addition to the Rules and Articles of War and other statutory enactments of Congress, the military establishment of the United States is governed by regulations issued by the President pursuant to or in execution of a statute, or in accordance with acts of Congress grant-

[1] The following Articles have been amended or repealed: Art. 17. by Act of July 27, 1892; Art. 60, by Act of March 2, 1901; Art. 62, by Act of June 18, 1898; Art. 72, by Act of July 5, 1884; Art. 80, repealed by Act of June 18, 1898; Art. 83, amended by Act of March 2, 1901; Art. 91, modified by Sec. 4, Act of July 27, 1892; Art. 94, repealed by Act of March 2, 1901; Art. 103, amended by Act of April 11, 1890; Art. 104, amended by Act of July 27, 1892; Art. 110, repealed by Act of June 18, 1898.

[2] Carter v. Roberts, 177 U. S. 496–497.

[3] See Lieber on Regulations.

ing specific authority therefor, and by rules, regulations and orders issued by him as Commander-in-Chief of the armies of the United States, and also by established customs and usages of the service.

**12.** Army Regulations are administrative rules as distinguished from enactments of Congress. They may be divided into several classes, viz.:

*a.* Those which have received the sanction of Congress. These are really legislative regulations and cannot be changed or altered by executive authority unless the regulations themselves so provide. They are of equal force with any other statute, and can only be changed, modified or repealed by legislative enactment.

*b.* Those made pursuant to, or in execution of, a statute, which are supplemental thereto and which, in the absence of sufficient legislative regulation, prescribe means for carrying it out.[1] These, if not prohibited by statute, may be modified by the executive authority;[2] but as they have all the force of legal enactments to which they conform, they cannot be changed or modified except in accordance with the provisions thereof, and until so modified they are as binding on the authority that made them as on others; nor can exceptions to them in individual cases be legally made.

*c.* Those emanating from, and depending on, the constitutional authority of the President as Commander-in-Chief of the Army and as Chief Executive, but not made in supplement to some particular statute. The authority which makes them can modify or suspend them as to any case, or class of cases, or generally.

The regulations emanating from, and depending on,

[1] Examples of regulations of this class are those relating to the examination of enlisted men for commissions, under the Act of Congress, July 30, 1892, and the Executive Order of June 12, 1905, and November 25, 1908, prescribing limits of punishment.

[2] United States v. Eliason, 16 Pet. (41 U. S.) 291.

the constitutional power of the President as Commander-in-Chief and in his duty as Executive, "to take care that the laws be faithfully executed," are generally promulgated through the Secretary of War, and have all the force of law because they are promulgated by him under the authority of law, and they are binding upon all within the sphere of his legal and constitutional authority.[1]

**13.** Army Regulations when directly approved by Congress have the absolute force of law. When not so approved they have the force of law when founded on the President's constitutional power as Commander-in-Chief of the Army, or when consistent with, and supplementary to, the Acts of Congress in reference to the Army;[2] but they do not control subsequent express provisions of law.[3] They are intended for the government of the officers and enlisted men of the Army and the agents of the War Department, and when not approved by Congress do not bind the Commander-in-Chief nor the head of the War Department; they not being regarded as in the military service in the sense of such regulations, but as civil officers.[4]

Army Regulations are mandatory, and are intended to govern the conduct of the Army, and all work done under the superintendence of its officers, wherever assigned to duty.[5]

**14.** Departmental Regulations. These are provided for by Sec. 161, Revised Statutes, which authorizes the head of each Department "to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and

[1] Gratiot v. U. S., 4 How. (45 U. S.) 117; U. S. v. Eliason, 16 Pet. (41 U. S.) 301; Kurtz v. Moffitt, 115 U. S. 503.
[2] Matter of Smith, 23 Ct. Cl. 452; Swaim v. U. S., 165 U. S. 553.
[3] Morrison's Case, 13 Ct. Cl. 1.
[4] U. S. v. Burns, 12 Wall. (79 U. S.) 246; Matter of Smith, 24 Ct. Cl. 209.
[5] Moses v. U. S., 116 Fed. Rep. 526.

preservation of the records, papers and property appertaining to it."

The word "Department" as here used means an Executive Department and not a subdivision or bureau of such Department.

**15.** The Military Academy Regulations are special regulations for the government of the cadets at West Point, are issued by the President of the United States, and are as binding as other regulations issued for the Army at large, of which they are legally a part.[1]

## GENERAL AND SPECIAL ORDERS

**16.** All rules and orders issued by the Secretary of War as the constitutional organ of the President for the administration of the military establishment are to be received as the acts of the Executive, and as such are binding upon all within the sphere of his authority.[2]

The legal orders of commanders to their subordinates are binding upon those subordinates. The Articles of War (Art. 21) provide that any officer or soldier who, on any pretense whatsoever, disobeys any lawful command of his superior officer shall suffer death, or such other punishment as a court-martial may direct.

**17.** Orders are either written or verbal. Written orders are either general or special. General orders of the War Department are those made public to the Army at large. Special orders affect only certain individuals or cases.[3]

[1] See Sec. 1094, R. S. [2] U. S. v. Eliason, 16 Pet. (41 U. S.) 291.

[3] General or special orders issued from the War Department or Headquarters of the Army, or other designated military headquarters, may ordinarily be proved by printed official copies duly authenticated by the impressed stamp of the Adjutant General's Office in the usual form, and courts-martial will take judicial notice of such authenticated orders as genuine and correct. "Copies of any records or papers in the War Department or any of its bureaus, or at the headquarters of an army, corps, division, or brigade, or of a territorial division or department, if authenticated by the impressed stamp of the bureau or office of the War Department, or of the headquarters having custody of the

General or special orders issued by a military commander outside the War Department or Headquarters of the Army, such as Division or Department Commanders, commanders of armies, corps, division or brigade in time of war, etc., are promulgated for their commands, in exercise of their authority as representing, within the territorial limits of their command, power derived from the Commander-in-Chief, or, in court-martial cases, authority expressly conferred upon them by statute. Such orders must not be in conflict with the statutes or with the orders of superior authority.

Verbal orders are legal commands issued by a superior to a subordinate *viva voce*, and violation thereof, as well as of written orders, may be made the subject of charges under the 21st Article of War.

**18.** Standing orders are in the nature of executive instructions that are intended to govern those to whom issued for a period of time and until changed or revoked. They generally relate to matters of police or discipline, or local regulations.

### THE UNWRITTEN LAW; LEGAL PRECEDENTS; DECISIONS OF COURTS

**19.** The unwritten law consists of the principles, customs and usages of the service derived from immemorial usage in time of peace or war. They are recognized by the 84th Article of War, being therein made applicable to the administration of justice in case of doubt not ex-

originals, may be admitted in evidence equally with the original thereof, before any military court, commission, or board, or in any administrative matter under the War Department." (G. O. 91, War Department A. G. O., 1900; G. O. 198, War Dept. 1908; Dig. Op. J. A. G. 1312. See Sec. 882, Revised Statutes U. S.)

There is no rule of law or practice requiring civil courts to take notice of orders issued by a military commander in the exercise of the authority conferred upon him. (Burke v. Miltenberger, 19 Wall. (86 U. S.) 519, 526.)

plained in those Articles. These customs must, however, have the sanction of long, unquestioned and continuous usage. When this is the case they are to be observed by courts-martial, unless manifestly wrong by reason of being in conflict with a statute or contrary to the precepts of morality and humanity. An example of a custom having the force of law is that of the witness before a court-martial being sworn by the Judge-Advocate; the law not providing who shall administer the oath.

**20.** "Usages have been established in every department of the government, which have become a kind of common law and regulate the rights and duties of those who act within their respective limits." "Usage does not alter law, but it is evidence of the construction given it." It does not have the force and character of unwritten law until by "immemorial and undisputed" usage it has become a custom of war which is entitled to be received as a part of the common law of the Army, and until it does become so it cannot be pleaded, except in mitigation of punishment. Evidence of a *local* custom is not admissible unless it is shown to be known to both parties.[1]

### LEGAL PRECEDENTS, DECISIONS OF COURTS, ETC.

**21.** The decisions of the courts upon questions of doubtful interpretation form precedents in like cases and determine the law. They are to be followed in the determination of such questions so long as those decisions or rulings of the courts are not reversed.

**22.** "Where a court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether its decisions be correct or otherwise, its judgments, until reversed, are regarded as binding in every other court. But if it act without authority, its judgments

[1] Chateaugay Iron Co. v. Blake, 144 U. S. 476.

and orders are nullities; they are not voidable but simply void."[1]

**Stare Decisis.** — The doctrine of *stare decisis* — to abide by precedent or to adhere to decided cases—prevails in civil courts with respect to decisions of other courts made directly upon the point in issue. Though the duly approved decisions of courts-martial are not binding upon other courts-martial, they should be well considered and, as a rule, followed.

**23.** The decisions and opinions of the heads of departments of government in matters which properly come before them relating to the military establishment, though not in themselves law, are intended to give interpretation of the law and, as an aid in forming judgment, it is generally safer and better to adopt them.

**24. Opinions of the Attorney-General.**—While Attorneys-General have never claimed for their opinions the force of law, it has always been regarded as the proper practice to follow their guidance; and Congress, while never directly legislating upon this point, seems to contemplate that their opinions are to be given practical effect and should be followed. Such opinions are, therefore, binding upon the Army when so directed in orders of the War Department.

**25. Opinions of the Judge-Advocate-General.**—The opinions of the Judge-Advocate-General upon questions of military law, approved by the Secretary of War, are binding upon the military establishment until overruled or reversed.[2]

[1] Elliott v. Peirsol, 1 Pet. (26 U. S.) 328.
[2] See Deming v. McClaughry, 113 Fed. Rep. 641.

## CHAPTER III

### MILITARY TRIBUNALS

**26.** The tribunals for *the trial* of military persons and offenses, under the laws for the government of the armies of the United States, are as follows:

1st. The statutory tribunals, viz.:

1. General Courts-martial.
2. Regimental Courts-martial.
3. Garrison Courts-martial.
4. Summary Courts.

2d. The Military Commission, a tribunal hereafter explained as belonging to the laws of war, which is recognized by Sec. 1343, Revised Statutes United States, as a tribunal for the trial of spies.[1]

These courts are not a part of the judicial system of the United States, but are executive agencies and have jurisdiction only within the limits prescribed by law. Being courts of special jurisdiction, the fact that they have jurisdiction must appear in every case, because without it their acts are wholly void.

**27. Not Part of the Judicial System of the United States; Their Decisions not Subject to Appeal to Civil Courts.**—Courts-martial not being part of the judicial system of the United States, no appeal can be taken from their judgments to any civil court, and their acts can only

[1] See post, par. 32.

be reviewed and modified by the legal reviewing authority, or by the President of the United States, and in the manner prescribed by law.

They are not "courts of record" within the legal meaning of that term, their existence being temporary and derived from orders issued by commanders authorized to convene and to dissolve them at will. They are, however, lawful tribunals with plenary jurisdiction over military offenses and with authority to finally determine any case over which they have jurisdiction, as have civil courts over offenses within their cognizance, and their proceedings, when confirmed as provided by law, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, whether the statutory rules prescribed for exercise of jurisdiction have been complied with, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced; and in such cases the review may be had by *habeas corpus* proceedings in the United States courts.[1]

**28.** Their jurisdiction is over criminal offenses alone and does not extend to civil cases. They also take into consideration matters that never come before a civil court because they act upon questions affecting the honor and discipline of the Army, and they partake of the character of a "court of honor," as when they try an officer charged with "conduct unbecoming an officer and a gentleman," or an officer or enlisted man for "conduct to the prejudice of good order and military discipline."

[1] In re Davison, 21 Fed. Rep. 618; In re McVey, 23 Fed. Rep. 878; In re Vidal, 179 U. S. 126; Carter v. Roberts, 177 U. S. 496; Carter v. McClaughry, 183 U. S. 365; McClaughry v. Deming, 186 U. S. 69.

The judgments of the court-martial may, however, be brought in question in other courts if an illegal punishment is alleged to have been awarded, as in an action in a State court against the reviewing officer, or a member of the court, sued therein for damages incurred by reason of the alleged illegal punishment.

**29.** The functions of a court-martial are not those of a criminal court in which the prosecution is subject to technical objections such as are sometimes used to interfere with justice or favor a criminal, but its purpose is to ascertain all the facts, to get at the whole truth and to make its judgments according thereto, avoiding the strict technicalities available in civil courts, and after as full an examination as possible, to decide the case according to the facts established by evidence, and according to the provisions of the Rules and Articles for the government of the armies of the United States, and if any doubt should arise, not explained by said Articles, then "according to their conscience, the best of their understanding, and the custom of war in like cases." [1]

**30.** The court-martial not only determines questions of fact, but is also called upon to decide questions of law.

Where the court-martial has acted without jurisdiction its acts and judgments are illegal and void,[2] and for any illegal punishment awarded by it, and executed, the members, and the officer who executes the sentence, are liable for damages in a civil suit.[3] Where, however, the court acts under proper orders and in good faith, and the proceedings have been duly approved, the actual damages awarded by a jury will be nominal.[4]

But having jurisdiction of the case, its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, as well the lowest as the highest, under like circumstances. The

[1] 84th Article of War.
[2] Barrett v. Hopkins 7 Fed. Rep. 312; Dynes v. Hoover, 20 How. (61 U. S.) 65.
[3] Ives. p. 35; Simmons on Courts-martial, 193, Sec. 459; Winthrop, Vol. 2, p. 126 et seq
[4] Winthrop, Vol. 2 p. 127

exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review.[1]

31. **Jurisdiction in Certain Cases.**—By entrance into the military service the citizen becomes a soldier. His relations to the state and the public are changed. He acquires *a new status*, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged.[2]

He surrenders certain of his personal rights as a citizen and adds to his personal responsibility by also becoming subject to military law, so that by the same act he may violate the laws of both jurisdictions, military and civil, and be punished by either. The civil courts punish for breach of the civil law, while the military courts may punish the same act as a violation of the Rules and Articles of War.

Where courts derive their jurisdiction and authority from the same Government, as is the case with courts-martial and the civil courts of the United States (those established in the Philippines being such courts), conviction or acquittal, by either of such tribunals, may be pleaded in bar of trial by the other as placing the accused "twice in jeopardy." But this rule will not apply as between courts-martial of the United States and courts established by another Government—as of a State[3]—and the accused cannot, in such case, plead conviction or acquittal by the courts of one in bar of jurisdiction of the courts of the other. The jurisdiction of the military and civil courts is concurrent in the sense that the one which first assumes jurisdiction over him, may first try him for the offense against the law which it administers.

In order, therefore, that military jurisdiction may

[1] Ex parte Reed, 100 U. S. 23.
[2] In re Grimley, 137 U. S. 147–152.
[3] Grafton v. United States, 206 U. S. 333; Cir. 43, War Dept. 1907.

promptly vest, in any case where there may be question of such concurrent jurisdiction, charges must be preferred at once and forwarded to the officer competent to order trial. If such officer deems trial inadvisable he will forward the charges, with his views thereon, to the Adjutant General of the Army.[1]

The Fifth Amendment to the Constitution, providing that "no person shall be held for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury," excepts "cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger." A soldier therefore gives up some of the constitutional rights possessed by the citizen,[2] in fact, he forfeits such of his civil rights as interfere with the duties and obligations acquired by his new status, as prescribed by the laws established for the government and regulation of the Army; but he retains all others the exercise of which is not *inconsistent* with military government and discipline, for the reason that the soldier in giving up rights of citizenship is not required to give up more than is absolutely necessary to the performance of his duties and obligations as a soldier.

**32. Military Commissions.**—Military commissions derive their authority primarily and mainly from the laws of war, and are not statutory tribunals, though recognized as legal and appropriate for trial of spies (Sec. 1343, Revised Statutes). They are organized under the laws of war and under martial law, as a military necessity, for cases involving persons and offenses outside the powers and duties conferred upon the statutory tribunals and therefore beyond the jurisdiction of courts provided for in the Rules and Articles of War.[3]

[1] A. R. 963; G. O. 128, War Dept. 1908.
[2] See U. S. v. Clark, 31 Fed. Rep. 713.
[3] See Chapter XXX, post, par. 682 et seq.

## CHAPTER IV

### GENERAL COURTS-MARTIAL

**33.** The power to convene general courts-martial is conferred upon certain officers by the 72d and 73d Articles of War; the former conferring a general power applicable to all times, and the latter relating to "time of war"; and it is also granted to the Superintendent of the U. S. Military Academy by Sec. 1326, Revised Statutes of the United States.

**34. In Time of Peace or War.**—The 72d Article of War.

Article 72.—Any general officer commanding an army, a territorial division or a department, or colonel commanding a separate department, may appoint general courts-martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case.[1]

Under this article any general officer commanding an army, a territorial division or a department, or a colonel commanding a separate department, may convene a general court-martial whenever charges are made and he deems that the circumstances demand it, and this power he has in time of war as well as in peace, wherever the troops may be, at home or abroad. The grant of power is not given

[1] Act July 5, 1884; see Article 72, Chapter XXXI, post, par. 779.

to, and cannot be exercised by, any officer of lower grade than colonel, and only by a colonel when commanding a separate department, either by assignment to such command by the President of the United States, directly, or when he succeeds to such command under the provisions of Army Regulations, which provide that, in the event of the death or disability or temporary absence of the permanent commander of a territorial division or department from the limits of his command, the senior line officer present and on duty therein will exercise the command of the division or department, unless otherwise ordered, until relieved by proper authority.[1]

**35.** The commander of a division who is also duly acting as commander of a department in the division, in the absence of the regular department commander, is authorized to convene general courts-martial under the provisions of this article.[2]

**36.** The President of the United States, in virtue of his power as constitutional Commander-in-Chief of the Army of the United States, has power to convene such courts and to review their proceedings, and it is his duty to do so, under the provisions of this article, when any commander authorized by it to convene a court-martial "is the accuser or prosecutor of any officer under his command," and also in cases where an officer having been dismissed by him in time of war makes application for trial as provided by Sec. 1230, Revised Statutes United States. It is to be noted that, according to the above article, the commander must be either the accuser or prosecutor of an "officer" under his command; the prohibition does not apply to other persons.

In all such cases the proceedings and sentence are sent direct to the Secretary of War to be laid before the President for his action thereon.

[1] A. R. 193. [2] Dig. Op. J. A. G. 190.

**37. Commander of Army, etc.**—The term "general officer commanding an army" includes not only generals commanding separate armies, designated as such, but the lieutenant-general or general officer who may be assigned by the President to command the Army of the United States. It also includes corps commanders in command of a separate army corps as being, in this respect, similarly situated as commanding "a separate army." It has been decided by the Secretary of War that under the 107th Article of War a corps commander is held to be a commander of an army in the field when his corps is not a constituent part of a larger body, and he may convene a court-martial under this article and confirm sentences of dismissal of officers.[1]

**38.** "A corps commander may also convene such court where the division or separate brigade commander is the accuser or prosecutor, by authority of the Act of December 24, 1861" (now 73d Article of War). "But sound principles of public policy require that only the highest military authority in any army should be vested with the final power of the confirmation and execution of sentences of death and dismissal, and the Act of December 24, 1861, has never been construed as conferring this power upon a corps commander when his command is not a separate and distinct army, but only, as in the case of a corps of the Army of the Potomac, a constituent part of a larger body."[2]

**39.** The power to convene courts-martial is a personal power as conferred by the statute and cannot be delegated to an inferior or to a staff officer; a staff officer, therefore, cannot, in the absence of the proper commander, act for him by convening courts-martial in his name, nor act upon proceedings of courts-martial under like circumstances.

[1] Cir. 30, War Department, A. G. O., August 9, 1898.
[2] Dig. Op. J. A. G. 191. See Cir. 30, War Department, A. G. O., August 9, 1898.

The officers designated by the Articles are the only ones to decide whether a court-martial shall be ordered in any case or not, and their decision is final. An officer or soldier cannot demand that charges submitted by him shall be brought to trial; nor can any person against whom charges have been made demand trial except in those cases specially provided by law, as by the 30th Article of War, and Sec. 1230, Revised Statutes.[1]

**40.** The authority of an officer authorized to convene general courts-martial extends to the convening of such courts for the trial of officers and soldiers under his command. "It is complete and exclusive within his jurisdiction, and it is within his jurisdiction to determine, in each instance, whether a court shall be ordered at all, or, if ordered, when and where (within his command) it shall be convened."[2]

Article 72 makes the commanders named in the article judges, in general, of the expediency of ordering such courts in particular instances.[3]

**41. In Time of War Only.**—The 73d Article of War.

Article 73.—In time of war the commander of a division, or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander.

The power to convene general courts-martial is, by this article, extended, in time of war, to the commander of a division or a separate brigade, but in case such commander is the accuser or prosecutor of "*any person*" under his command the court must be appointed by the next higher commander. This article differs in terms,

[1] Davis' Military Law, p. 19; Dig. Op. J. A. G. 184.
[2] Winthrop's Abr., 3d Ed., p. 25.
[3] Davis' Military Law, p. 19.

as to the commander being the "accuser or prosecutor," from Article 72, in its application to "any person," whilst Article 72 is limited to "any officer."

**42.** To constitute a separate brigade under this article it must be actually such, acting separately or as a distinct command, as an organized brigade detached from and unconnected with any division, or be designated in orders as a "separate brigade." [1] The fact that it is a separate brigade should appear in the proceedings.

The determination as to whether a condition of war exists, is within the exclusive jurisdiction of the political department of the government, and the courts take judicial notice of such determination and are bound thereby.[2]

**43. Accuser or Prosecutor.**—An "accuser" is one who makes the accusation. A "prosecutor," in the general meaning of the term, is one who institutes and carries on proceedings against, or prosecutes, another for a crime in the name of the government.

The word as used in Article 72 and Article 73 is not limited to this meaning, but is intended to designate the person who, having authority to convene a general court-martial, enters into the case with a hostile animus and an intent to secure the conviction and punishment of the accused, and whose hostile animus prevents impartial action.

The question as to whether a commander is the "accuser" or "prosecutor" under either of the foregoing articles must be determined by his animus in the case. If he has simply directed the charges to be preferred as a matter of, and in line with, his official duty, he cannot be held to have such animus as would constitute him an "accuser" or "prosecutor." But if he has any personal interest in the subject of the charges, or has shown mani-

[1] Dig. Op. J. A. G. 192 et seq.
[2] Hamilton v. McClaughry, 136 Fed. Rep. 445, 449.

fest hostility toward the accused, objection may be made to the legal constitution of the court, and the accused is entitled to introduce evidence of the fact before the court, or in an appeal to higher authority.

The provision of this Article (and of Article 72), that when the convening commander is the "accuser or prosecutor" the court shall be convened by the next higher commander (or by the President under Article 72), being expressly restricted to general courts, has no application to regimental or garrison courts. The same principle, however, should properly be applied to proceedings before these courts, if it can be done without serious embarrassment to the service.[1]

**44. Superintendent of the Military Academy.**—The Superintendent of the Military Academy has power to convene general courts-martial for the trial of cadets and to execute the sentences of such courts, except the sentences of suspension and dismission, subject to the same limitations and conditions now existing as to other courts-martial.[2]

The general courts-martial herein authorized are, in their organization, composition, and method of conducting business, subject to the same limitations and conditions existing as to other courts-martial. Under the limitations of this section, sentence of suspension or dismission, though approved by the Superintendent, cannot be carried into effect without the order of the President of the United States, usually given through the Secretary of War.

**45.** Any officer competent to appoint a court-martial may appoint a judge-advocate for the same.[3]

[1] Dig. Op. J. A. G. 189.
[2] See sec. 1326, Revised Statutes United States.
[3] Article 74.

## CHAPTER V

### COMPOSITION OF GENERAL COURTS-MARTIAL

**46. Composed of Officers.**—"General courts-martial may consist of any number of officers, from five to thirteen, inclusive; but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service."[1] If there are less than five the court is without a quorum and cannot proceed with the trial of any case. It may, however, adjourn until the convening officer can be informed, and if five are present and one of them is challenged the remaining four may act upon the challenge. Article 75, quoted above, is merely directory to the officer appointing the court, and his decision as to the number that can be convened without manifest injury to the service, being a matter left to his sound discretion, must be conclusive;[2] provided it does not fall below the minimum number of five.

**47.** The word "officer," as used in Sec. 1342, Revised Statutes, which section contains the Articles of War, is understood to designate "commissioned officers" only. This is held to include officers commissioned by the President during the recess of the Senate, though their nomination may not yet have been confirmed. There is one exception made to this meaning of the word "officer," by its use in the 24th Article of War, giving power to "all officers, of

[1] Article 75.
[2] Martin v. Mott, 12 Wheat. (25 U. S.) 19; Swaim v. U. S., 165 U. S. 559.

what condition soever," to "part and quell all quarrels, frays and disorders" which, in this instance, has been held to include non-commissioned officers, as well as those commissioned. But whenever a junior places a senior in arrest, under such circumstances, he must immediately report the fact to the commanding officer.

48. Details of officers as members of general courts-martial have heretofore been limited to officers on the active list of the Army, or on duty with forces in active service, but by an enactment of April 23, 1904, the Secretary of War may, with their consent, assign retired officers of the Army to active duty in recruiting, for service with the organized militia of the several States and Territories, as military attachés, upon courts-martial, courts of inquiry, and boards, and to staff duties not involving service with troops; and such officers while so assigned will receive full pay and allowance of their respective grades.[1] Professors of the U. S. Military Academy, having been given actual rank in the Army by Act of June 28, 1902, are eligible for detail as members of courts-martial; but the character of their duties is such that it would be inexpedient to so detail them.

49. It is provided by the 79th Article of War that no officer, when it can be avoided, shall be tried by officers inferior to him in rank. It is, however, within the power of the convening authority to determine the question of rank, as well as the number of members within the prescribed limits, and his action is conclusive.[2] The fact that a member of a court is junior in rank to the accused does not, of itself, constitute a ground for his excuse from serving as a member of the court if challenged; it must be shown that the junior has an immediate and direct

[1] Act April 23, 1904.

[2] Dig. Op. J. A. G. 210–211; Mullan v. U. S., 23 Ct. Cl. 34; Id., 140 U. S. 240, 245; Swaim v. U. S , 165 U. S. 559 560.

interest in the result of the trial, such as that the conviction and dismissal of the accused would advance him to the next higher grade.

**50. Eligibility of Officers in Certain Cases.**—The general laws and rules given above as to the composition of courts-martial apply to all cases arising in the regular forces; but there are sometimes in the service of the United States "other forces," and it is provided by the 77th Article of War that "officers of the Regular Army shall not be competent to sit on courts-martial to try officers and soldiers of other forces except as provided in Article 78." This Article (78) provides that "officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached." This constitutes the only exception to the rule contained in Article 77.

### FOR TRIAL OF VOLUNTEERS OR MILITIA [1]

**51.** Volunteers and Militia are "other forces" within the meaning of the 77th Article of War, and a court constituted with one or more regular officers as members thereof for the trial of a volunteer would be without jurisdiction and its judgment void.[2]

This, therefore, excludes officers of the Regular Army from sitting upon courts-martial for the trial of Volunteers or Militia: but officers of either Militia or Volunteers are not excluded from sitting upon courts for the trial of officers or soldiers of the Regular Army; and militia officers may sit upon courts for trial of officers or soldiers of Regu-

[1] See Articles 123 and 124, Chapter XXXI, post. par. 830, 831.

[2] Deming v. McClaughry, 113 Fed. Rep. 639, 640; McClaughry v. Deming, 186 U. S. 49.

lars or Volunteers; but the majority membership of courts-martial for the trial of officers or men of the Militia, when in the service of the United States, must, by law, be composed of militia officers.[1]

[1] Act of January 21, 1903, as amended by Act of May 27, 1908.

In view of the wording of the Act of Congress, approved April 22, 1898, which declares that the Army of the United States in time of war shall consist of both the Regular Army and the Volunteer Army, it was at one time held "that such Volunteer Army is not with respect to the Regular Army 'other forces' within the meaning of this Article, and that therefore officers of the Regular Army are competent to sit on courts-martial for the trial of officers or soldiers of such Volunteer Army." (Dig. Op. J. A. G. 209.) But the matter coming before the U. S. courts by writ of habeas corpus, it was held by the U. S. Circuit Court that the words "other forces" include the volunteer forces, and that officers of the Regular Army are incompetent, under said Article, to try officers or soldiers of the volunteer forces. This decision was sustained by the Supreme Court of the United States in the case of McClaughry v. Deming. 186 U. S. 49.

The Court of Claims in a recent case (Brown's Case, 41 Ct. Cl. 275) has held that a court-martial was without jurisdiction, because the president of the court, although he held a volunteer commission, was a regular officer. But this being opposed to established precedent, the case was taken to the Supreme Court of the United States, where the decision of the Court of Claims was sustained, and it is now established that a regular officer, *though holding a commission in volunteer forces*, cannot sit upon courts-martial for the trial of volunteers. (U. S. v. Brown, 206 U. S. 240.)

## CHAPTER VI

### JURISDICTION OF COURTS-MARTIAL

**52. General Courts-martial.**—The jurisdiction of a court-martial is its legal power to try and determine cases legally referred to it and, in case of a finding of guilty, to award the punishment for the offense within its prescribed limits.

Being courts of special and limited jurisdiction their organization, powers and mode of procedure must conform to all the statutory provisions relating thereto. Should the court be illegally constituted or exceed its jurisdiction or powers by failing to comply with the requirements of law, its acts are void and the members of the court may be held liable in damages by the aggrieved party. If in its proceedings or sentence it transcends the limit of its jurisdiction, the members of the court and the officer who executes the sentence are trespassers, and as such answerable to the party injured in damages in the civil courts.[1] But when acting within its jurisdiction errors or mistakes made are not subject to review collaterally, or to be redressed by *habeas corpus*.[2] It is therefore necessary that the question of jurisdiction be ascertained before trial begins or sentence is given, and this is determined by ascertaining that the court is legally

[1] 3 Greenleaf, Sec. 470; Ives, p. 35; Dynes v. Hoover, 20 How. (61 U. S.) 65.

[2] Carter v. Roberts, 99 Fed. Rep. 948; Dynes v. Hoover, 20 How. (61 U. S.) 65; Carter v. McClaughry, 183 U. S. 365; McClaughry v. Deming, 186 U. S. 69.

organized by competent authority, that the persons brought before it for trial are amenable to military law, and that the offenses committed are within its jurisdiction.[1]

**53. Territorial Jurisdiction.**—These courts being instituted under authority of military law, there is no territorial limit to their jurisdiction; it accompanies the military establishment wherever it goes.

**54. Jurisdiction as to Persons and Offenses.**—The jurisdiction of courts-martial extends to all persons belonging to the military establishment at all times and in all places wherever the Army, or any part thereof, may be serving, whether within or without the limits of the United States.[2] It extends also to all officers and soldiers of "other forces"—as the Marines detached for service with the Army, Volunteers or Militia mustered into the service of the United States—and "all retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers" (Article 63), and, in time of war, to persons relieving or knowingly harboring or protecting an enemy (Article 45); or holding correspondence with or giving intelligence to the enemy (Article 46), and to spies (Sec. 1343, Revised Statutes United States).

The jurisdiction of courts-martial is purely criminal; they cannot take cognizance of civil matters, and, being statutory courts, the crimes of which they do take cognizance must be covered by the statutes conferring jurisdiction upon them, and unless such jurisdiction is given the case cannot be tried by such court.

When the offense is not specifically named in the Articles of War, or other statutes, the question as to whether particular charges, in violation of the 61st or 62d Articles of War, amount to offenses covered by those articles is a matter for the court-martial to determine in the proper exercise of its discretion within its jurisdiction, and

[1] See Runkle v. U. S., 122 U. S. 543, 545.

[2] See Art. 63 and Art. 64, Chapter XXXI, post, par. 770, 771.

its decision is not subject to review by the civil courts.

**55.** General courts-martial have exclusive jurisdiction over officers (Article 83); cadets (Sec. 1326, Revised Statutes); candidates for promotion (Act July 30, 1892);[1] and capital cases (Article 83) and, in time of war, insurrection, or rebellion, offenses named in the 58th Article of War; and concurrent jurisdiction with the inferior courts over all cases of enlisted men (other than candidates for promotion), military convicts, and, in time of war, retainers to the camp, and persons, though not enlisted soldiers, serving with the Army in the field (Article 63), and of all offenses of which the inferior courts may take cognizance, when the limit of punishment is in excess of the punishing power of such courts.[2]

**56.** The jurisdiction of courts-martial is not exclusive, however, as to acts which, in addition to being offenses against military law, also constitute offenses against the civil law, of which civil courts may take cognizance. In case of such double amenability the military may give precedence to the civil court, but if its jurisdiction is first fully attached and an officer or soldier has been duly and legally arraigned before a court-martial, its jurisdiction cannot be set aside by the process of a State court.[3] But an acquittal by a civil tribunal established under State authority for an offense against the civil law of the State is no bar to trial by a court-martial organized under authority of the United States for an offense against its military law, nor is a trial by such military court a bar to trial by the State civil court.

Where, however, an accused is tried either by a civil court or a court-martial, both being established by the same Government—that of the United States—trial by either is a bar to trial by the other, for an act constituting substantially the same offense, as placing him "twice in jeopardy".[4]

[1] See G. O. 79, H. Q. A., A. G. O., 1903.
[2] Court-martial Manual, pp. 15, 16.
[3] See Carter v. McClaughry, 183 U.S. 400; Smith v. Whitney, 116 U.S. 178.
[4] Grafton v. United States, 206 U. S. 333; Cir. 43, War Dept., 1907.

**57.** The jurisdiction of a court-martial cannot be inferred; its authority is statutory and the statute under which it proceeds must be followed throughout. The facts necessary to show its jurisdiction and that its sentence was conformable to law must be stated positively, and it is not enough that they may be inferred argumentatively.[1] Consent cannot confer jurisdiction upon an illegally constituted court.[2] In order to give effect to the judgment of a court-martial it must appear affirmatively that the court was legally constituted, that it had jurisdiction, and that all the statutory requirements governing its proceedings had been complied with.[3]

**58.** Cadets at the U. S. Military Academy are a part of the Army of the United States and are subject to trial by court-martial.[4] They are not officers within the meaning of Sec. 1229, 1342, Rev. Stat. U. S., and if delinquent, may be dismissed by the President without trial and conviction by court-martial.

**59.** The trial of cadets by the summary court would not be authorized; such courts being established for the trial of enlisted men only. Cadets occupy a status of their own in the Army not identical with that of either a commissioned officer or an enlisted man. They are officers of the military establishment whose appointments are evidenced by warrants rather than by formal commissions.

**60. In Time of War, Insurrection, or Rebellion,** the jurisdiction of general courts-martial extends to larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or an assault and battery with intent to commit rape, when committed by persons in the military service of the United

[1] McClaughry v. Deming, 186 U. S. 63.
[2] Id. 66.
[3] Runkle v. U. S., 122 U. S. 543, 545; McClaughry v. Deming, 186 U. S. 69.
[4] See Sec. 1326, Revised Statutes; Act February 2, 1901; Hartigan v. U. S., 196 U. S. 169.

States, and the punishment must not be less than that provided, for the like offense, by the laws of the State, Territory, or District in which such offense may have been committed.[1]

**61.** The jurisdiction of the general court-martial also extends at all times to minor included offenses in any charge laid before it; if the charge is murder the accused may be found not guilty of murder, but of the lesser included offense of manslaughter; or in a charge of desertion the finding may be not guilty of desertion, but guilty of absence without leave.

**62.** The judgment of a court-martial rendered upon subjects within its jurisdiction is as legal and valid as those of any other tribunal, nor is such judgment subject to be appealed from, or set aside, or reviewed by the courts of any State, or of the United States, by writ of *habeas corpus* or otherwise.[2]

**63.** Jurisdiction being had, members of military tribunals are not liable for their action unless it can be shown that they acted maliciously. Such tribunals unite in themselves the functions of the judge and jury, deciding questions of law, when necessary, as well as questions of fact. But where the court was without jurisdiction, this question, and also the legality of the sentence, may be determined and may be reached by a writ of *habeas corpus*, and its proceedings set aside as illegal and void.[3] And where a prisoner is alleged to be illegally restrained as a

[1] Article 58; see post, par. 765.

[2] Davis' Military Law, p. 15; Dig. Op. J. A. G. 992, and references; Deming v. McClaughry, 113 Fed. Rep. 639; McClaughry v. Deming, 186 U. S. 49; Johnson v. Sayre, 158 U. S. 118; Dynes v. Hoover, 20 How. (61 U. S.) 65, 82; Ex parte Reed, 100 U. S. 13; Ex parte Mason, 105 U. S. 696; Smith v. Whitney, 116 U. S. 167, 177, 179; In re Coy, 127 U. S. 731; U. S. v. Pridgeon, 153 U. S. 49; Carter v. McClaughry, 183 U. S. 365. But its decision that a witness must answer a question, the answer to which will incriminate him, is not final or conclusive upon the Federal Court, when the witness is tried, under the Act of March 2, 1901, for his refusal to testify. U. S. v. Praeger, 149 Fed. Rep. 474.

[3] Carter v. Roberts, 99 Fed. Rep. 948; Id., 177 U. S. 496–7; Deming v. McClaughry, 113 Fed. Rep. 639; McClaughry v. Deming, 186 U. S. 49.

consequence of the action of such a court he may be brought before a Federal civil court by writ of *habeas corpus*, and if the court-martial was without jurisdiction the prisoner may be discharged. The writ of *habeas corpus* cannot, however, be made to serve the purpose of a writ of error[1] the function of which is to review and correct an error of law committed in the proceedings.

**64. Jurisdiction over Persons after Expiration of Service.**—Under ordinary circumstances separation from the military service ends all responsibility for offenses committed against military law; even on re-enlistment the soldier will not be liable for an offense committed during a previous enlistment; the discharge cancels all previous military obligations. Separation from the service returns him to his status of a civilian; but he still remains subject to military jurisdiction in the following cases:

*a.* The 60th Article of War, which provides that "if any person, being guilty of any of the offenses aforesaid (fraudulent claims, embezzlement, etc., named in the Article), while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

This provision of law is, however, subject to the statute of limitations, 103d Article of War.

*b.* Under Sec. 5 of the Act of June 18, 1898, it is provided "that soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice." This provision is intended for the control and government of military convicts, men who have been sentenced to dishonorable discharge and to terms of confinement at military posts or elsewhere.[2]

[1] In re Coy, 127 U. S. 731; McClaughry v. Deming, 186 U. S. 69; Carter v. McClaughry, 183 U. S. 365.

[2] A. R. 936.

**65.** In cases also where jurisdiction has been taken by arrest or confinement of an officer or soldier before the expiration of his term of service or separation therefrom, with a view to his trial, such jurisdiction will attach and continue, even though the term of service for which he has been enlisted expires but his discharge has not been given him. The person is then still held to a performance of his duty, not as a soldier under his enlistment contract, but in his status as an offender, subject to the jurisdiction of the court-martial. The fact that the term for which he enlisted has expired will not oust the jurisdiction of the court, but trial may be had and judgment and sentence be awarded and executed.

This rule also applies to the case where jurisdiction has been taken over a minor charged with desertion, even though he enlisted unlawfully without the consent of his parent or guardian.[1]

In cases of desertion in time of peace and not in the face of the enemy, it is provided by the 103d Article of War that the statute of limitation shall not begin to run until the end of the term for which said person was mustered into the service, so that although the term of service for which he was enlisted has expired, a court-martial will have jurisdiction for trial of the deserter at any time within two years thereafter.

**66.** Under the provisions of Sec. 1230, Revised Statutes, an officer who, in time of war, has been dismissed by order of the President is entitled to a trial by a general court-martial upon application in writing therefor, and the court-martial will have jurisdiction of the case.

But the dropping of an officer for desertion after three months' absence from duty without leave, under Sec. 1229, Revised Statutes, separates him summarily from the service

[1] In re Carver, 142 Fed. Rep. 623.

and he cannot afterward be arrested and tried by court-martial.[1] A court-martial has no jurisdiction over an officer after he has left the service,[2] except under the 60th Article of War. Nor can the officer dropped for desertion demand trial by general court-martial under Sec. 1230, Revised Statutes.[3]

**67. Conditions Necessary to Show Jurisdiction.**—The jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites:

*a.* That it was convened by an officer empowered by the statutes to call it.

*b.* That the officers whom he commanded to sit upon it were of those whom he was authorized by the Articles of War to detail for that purpose.

*c.* That the court thus constituted was invested by the Acts of Congress with power to try the person and the offense charged.

*d.* That the statutory rules prescribed for the exercise of jurisdiction have been complied with.

*e.* That the sentence was in accordance with the law.

The absence of any of these indispensable conditions renders the judgment and sentence of a court-martial *coram non judice* (without jurisdiction), and absolutely void, because such a judgment and sentence is rendered without authority of law and without jurisdiction.[4]

**68. Contempts of Court.**—Courts-martial have power given them to preserve order in the court, and enforce respect, by statutory provision in the Articles of War, as follows:

Article 86.—A court-martial may punish, at discretion, any person who uses any menacing words, signs, or gestures

[1] Ives, p. 48; G. C. M. O. 16 War Department, August 30, 1871.
[2] 24 Op. Attorney-General 570.
[3] 17 Op. Attorney-General 13; Newton v. U. S., 18 Ct. Cl. 435.
[4] Deming v. McClaughry, 113 Fed. Rep. 650.

in its presence, or who disturbs its proceedings by any riot or disorder.

**Contempts are Either Direct or Indirect.**—Direct contempt consists in noisy or disorderly conduct in the presence of the court or so near it as to interrupt its proceedings, or in improper language tending to interfere with the proper administration of justice. The 86th Article of War is authority for the punishment of *direct* contempts and refers distinctly to "any person." This embraces the judge-advocate, the accused, a military witness, the prosecutor, counsel, clerk, guard, or any officer or soldier who may be present as a spectator. The rank of the person is immaterial.[1] It is not confined in its terms to military persons alone, but may be applied to civilians belonging to the military establishment and subject to its laws.[2] Military persons guilty of contempt may be punished summarily, or be placed in arrest, and have charges preferred against them.[3] Courts-martial have no power apart from this statute to punish civilian witnesses for contempt, and therefore could not punish a witness for failure to obey a subpœna (though his presence might be enforced by an attachment), nor for his refusal to testify after being brought before the court. Provision has, however, been made by recent enactment of Congress for punishment in such cases by the U. S. District Court[4] for the State, Territory, or District in which such general court-martial is held.

As courts-martial have no appointed means of enforcing their mandates, they cannot exercise the power of punishment of contempt against civilians, though they might

[1] Winthrop, Vol. 1, p. 431.

[2] Authorities differ on the question as to whether the words "any person," in the foregoing article, include "civilians." As courts-martial have no inherent power to punish for contempt, it is believed that these words should be construed to mean "any person *subject to military jurisdiction*," and as not applying to others not subject thereto.

[3] Ives, p. 146; Davis' Military Law, p. 140.

[4] Act March 2, 1901.

cause the arrest of such persons and their removal from the court-room, and, if necessary, from the military reservation in an aggravated case, through request therefor to the commanding officer at the post where the court is sitting, or to the convening authority. The commanding officer will execute the request of the court with the same propriety and legality as he executes the arrest of the accused under charges, furnishes the court with a guard, or performs any other ministerial function in aid of its proceedings,[1] and will act under the same authority as he would in the removal of any other person guilty of disorderly conduct within the territorial jurisdiction under his command. If the contempt of a civilian amounts to a breach of the peace, the court may take steps to have him brought before the proper civil tribunal therefor.

The contempts rendered punishable by this Article (86) are of a public and self-evident kind, not depending upon any interpretation of law admitting of explanation, or requiring further investigation.[2]

**69. Members of the Court** are not punishable for contempt, but any disorderly conduct should be reported to the convening authority, and they should be proceeded against as for any other offense against good order and military discipline.[3]

**70. Method of Procedure in Cases of Direct Contempt.**—The procedure in case of direct contempt of court is summary in character. The court suspends its proceedings in the case before it and arraigns the person in contempt, giving him an opportunity to explain; if it finds his explanation insufficient or inadequate it at once awards the punishment, which becomes immediately effective, not needing the approval of the convening authority to make it valid, or to authorize the execution

[1] Winthrop's Abr., 3d Ed., p. 118; see Davis' Military Law, p. 140.
[2] Ives, p. 146.
[3] See A. R. 955.

of its sentence. Instead of such summary proceeding the court may cause charges to be drawn under the 62d Article of War against a person who is in the military service, and he may be brought to trial upon that charge before another court.

Each court is the exclusive judge of contempts before it.

**71. Indirect Contempt.**—An indirect or constructive contempt is one offered elsewhere than in the presence of the court, and which tends to degrade or make impotent the authority of the court or in some manner to impede or embarrass the due administration of justice.[1]

**72.** The refusal of a witness to obey the subpœna and come before the court-martial is not punishable as an indirect contempt of court. In such cases the law, Sec. 1202, Revised Statutes, United States, gives the judge-advocate of a court-martial power to compel, by means of a writ of attachment, the attendance of witnesses within the State, Territory, or District in which the court is sitting; but, until the Act of March 2, 1901, it could not compel a witness to testify when brought before it.

It is now provided, however, that "every person, not belonging to the Army of the United States, who, being duly subpœnaed to appear as a witness before a general court-martial of the Army, wilfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States, and it shall be the duty of the U. S. district attorney, on the certification of the facts to him by the general court-martial, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more

[1] American and English Encyclopædia of Law, Vol. 7, p. 28.

than five hundred dollars or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That this shall not apply to persons residing beyond the State, Territory, or District in which such general court-martial is held, and that the fees of such witness, and his mileage at the rates provided for witnesses in the U. S. district court for said State, Territory, or District, shall be duly paid or tendered said witness." [1]

**73.** The proper step to secure this punishment, as now provided by law, is for the court to make a certification that the person (designating him by name and place of residence, which must be in the State, Territory, or District where the court is sitting), after having been duly subpœnaed and tendered his fees, as provided by law, has wilfully neglected or refused to appear, or refuses to qualify as a witness, or to testify, or to produce documentary evidence which he has been called upon to produce. This certification should be authenticated by the signatures of the president and judge-advocate of the court-martial and be placed in the hands of the U. S. district attorney for the district in which such court is held, whose duty it will be under the law to file an information against and prosecute the person so offending.

The district attorney must also be furnished with a complete statement of the case, which should include a copy of the order convening the court, the name and rank of the person to be tried, with a statement of the charges against him, and with the original subpœna to the witness with evidence of service thereof, and of the fact of payment or tender of his fees, together with the names of necessary witnesses to the fact of the refusal or failure of the witness to comply with the requirements of the law, and the judge-advocate's certificate that he is a necessary and material witness in the case.

[1] Act of March 2, 1901.

## CHAPTER VII

### JURISDICTION: INFERIOR COURTS-MARTIAL

**74. The Garrison Court-martial: Organization, Jurisdiction, etc.**—This is a court for the trial of minor offenses; it can neither try capital cases nor commissioned officers. It derives its authority from the 82d Article of War which provides that "every officer commanding a garrison, fort or other place, where the troops consist of different corps, shall . . . be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offenses not capital."

This article limits the jurisdiction of the court and prescribes the exact number of its members. This court is also provided with a judge-advocate appointed by the convening authority under the general provision therefor contained in the 74th Article of War.

It has been held sufficient to fulfil the requirement as to "different corps" if there be on duty a single officer or enlisted man of another arm of the service than that of which the main body is composed.[1]

**75.** The jurisdiction of this court extends to all cases not capital, however grave the offense; but as punishment by it is limited by the 83d Article of War, not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and, in addition thereto, in the case of non-commissioned officers, reduction to the ranks, and in case of first-class privates

[1] Court-martial Manual, p. 81; Dig. Op. J. A. G. 217.

reduction to second-class privates, all offenses requiring more severe punishment should be referred to a general court-martial. This reference is to be decided, however, by the officer to whom the charges are sent and who has the legal power and authority to convene the court in the first instance. The record of a garrison court-martial is similar in form to that of a general court, but testimony taken before a garrison or a regimental court-martial will not be reduced to writing.[1]

**76.** The garrison court-martial cannot try capital cases nor commissioned officers, cadets, or candidates for promotion; but it has jurisdiction over all other enlisted men, military convicts, and, in time of war, over the persons described in the 63d Article of War.

A garrison court-martial may be convened under the following circumstances:

*a.* Where the accused, not being an enlisted man or a general prisoner, is not subject to the jurisdiction of a summary court, although he is subject to the jurisdiction of other inferior courts-martial, such as "retainers to the camp," and persons serving with the armies of the United States in the field.[2]

*b.* In case the accused before trial refuses to consent in writing to trial by summary court, the case being one which a summary court cannot, under these circumstances, adequately punish.

*c.* When the accused, being a non-commissioned officer, objects to trial by summary court.

Whenever under the summary court act or the 83d Article of War it becomes necessary to convene a garrison or regimental court, the order appointing it will state the facts which bring the case to be tried within the exceptions of those laws.[3]

[1] A. R. 988.
[2] See Article 63, Chapter XXXI, post, par. **770.**
[3] Court-martial Manual, p. 82, A. R. 969.

**77. The Regimental Court-martial.** — Regimental courts-martial have the same organization, authority, jurisdiction and powers of punishment, and are subject to the same restrictions as are prescribed for garrison courts-martial, except that regimental courts must be composed wholly of officers of the regiment or corps to which the accused belongs. They are convened by the commander of the regiment or corps,[1] and the word "corps" includes the Corps of Engineers, the Ordnance and the Signal Corps.[2]

**78.** The functions of both the garrison and regimental courts-martial have been largely transferred to the summary court. These courts are now only organized, as a rule, for the trial of non-commissioned officers who object to trial by the summary court, or in cases of other enlisted men where the accused shall, before trial, refuse to consent in writing to trial by the summary court; in which case the law provides that trial may be had either by general, regimental or garrison court-martial. A non-commissioned officer can object to trial by any inferior court, but may waive the objection and be tried by either of them, or, notwithstanding his objection, he may be brought before either of them by the authority of the officer competent to order his trial by a general court-martial.[3] A private soldier who refuses before trial to consent in writing to trial by summary court may be brought before a general, regimental, or garrison court-martial, or before the summary court with a limitation of its power of punishment to one month's pay and one month's confinement.[4]

**79. The Summary Court.**—The summary court has, by recent enactment, entirely displaced the field officer's court, and largely supplanted the garrison and regimental

[1] Article 81, Chapter XXXI, post, par. 788.
[2] Dig. Op. J. A. G. 212; Court-martial Manual, p. 83.
[3] A. R. 967.
[4] Article 83, post, par. 790.

courts-martial in their functions. The summary court was first established by Act of Congress of October 4, 1890, which has since been modified by Act of June 18, 1898. Its object is to secure the speedy trial and disposal of cases of enlisted men properly triable by the inferior courts. As originally enacted it was in force only in time of peace and corresponded to the field officer's court, which was authorized by law "in time of war" only. The field officer's court was authorized by the then existing Article 80 of the Articles of War, which provided that "in time of war a field officer may be detailed in every regiment, to try soldiers thereof for offenses not capital; and no soldier, serving with his regiment, shall be tried by a regimental or garrison court-martial when a field officer of his own regiment may be so detailed." The summary court therefore ceased operation in time of war until the Act approved June 18, 1898, remedied the defect and repealed Articles 80 and 110, which Articles authorized and provided for the field officer's court.

**80.** This summary court act provides that "the commanding officer of each garrison, fort, or other place, regiment or corps, detached battalion, or company, or other detachment in the Army, shall have power to appoint for such place or command, or in his discretion for each battalion thereof, a summary court to consist of one officer to be designated by him, before whom enlisted men who are to be tried for offenses, such as were prior to the passage of the Act 'to promote the administration of justice in the Army,' approved October 1, 1890, cognizable by garrison or regimental courts-martial, and offenses cognizable by field officers detailed to try offenders under the provisions of the 80th and 110th Articles of War, shall be brought to trial within twenty-four hours of the time of the arrest, or as soon thereafter as practicable, except when the accused is to be tried by general court-martial; but such

summary court may be appointed and the officer designated by superior authority when by him deemed desirable; and the officer holding the summary court shall have power to administer oaths and to hear and determine such cases, and when satisfied of the guilt of the accused, adjudge the punishment to be inflicted, which said punishment shall not exceed confinement at hard labor for one month and forfeiture of one month's pay, and, in the case of a non-commissioned officer, reduction to the ranks in addition thereto; that there shall be a summary court record kept at each military post and in the field at the headquarters of the proper command, in which shall be entered a record of all cases heard and determined and the action had thereon; and no sentence adjudged by said summary court shall be executed until it shall have been approved by the officer appointing the court, or by the officer commanding for the time being: *Provided*, That when but one commissioned officer is present with the command he shall hear and finally determine such cases: *And provided further*, That no one while holding the privileges of a certificate of eligibility to promotion shall be brought before a summary court, and that non-commissioned officers shall not, if they object thereto, be brought to trial before summary courts without the authority of the officer competent to order their trial by general court-martial, but shall in such cases be brought to trial before garrison, regimental, or general courts-martial, as the case may be." [1]

This Act repeals Articles 80 and 110 of the Articles of War, relating to field officer's court, and provides "that the commanding officers authorized to approve the sentences of summary courts and superior authority shall have power to remit or mitigate the same."

[1] Act June 18, 1898.

**81.** The limit of punishment as contained in the foregoing Act was extended by Act approved March 2, 1901, which amends the 83d Article of War to read as follows:

Article 83.—Regimental and garrison courts-martial and summary courts detailed under existing laws to try enlisted men shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto, in the case of non-commissioned officers reduction to the ranks, and in the case of first-class privates reduction to second-class privates: *Provided,* That a summary court shall not adjudge confinement and forfeiture in excess of a period of one month, unless the accused shall before trial consent in writing to trial by said court, but in any case of refusal to so consent, the trial may be had either by general, regimental or garrison court-martial, or by said summary court, but in case of trial by said summary court without consent as aforesaid, the court shall not adjudge confinement or forfeiture of pay for more than one month.

**82.** It will be seen by the foregoing laws that the summary court now has jurisdiction over enlisted men,[1] including military convicts, in time of war as well as peace; that its power extends to the trial of enlisted men only, others not being subject to its jurisdiction; that in cases of consent in writing to trial by such court its power of punishment has been largely extended, and that it has also been given power to reduce first-class privates to second-class privates.

An officer who shall constitute the summary court is to be designated by the commanding officer, but he may be designated by superior authority when by him deemed desirable, and he is not subject to challenge.

[1] Act June 18, 1898.

A commanding officer cannot appoint himself a summary court if other officers are present with the command.[1]

The summary court officer is not sworn in the cases on trial before him, but acts under his oath of office. He administers the oaths to witnesses, makes the necessary certificate as to the fact of attendance in case of a civilian witness, and administers the oath respecting his expense account;[2] but is not empowered to issue writs of attachment to compel the attendance of civilian witnesses.

The procedure of the summary court should be similar to that of the older courts-martial. The charges and specifications should be read to the accused, and he be required to plead, and the witnesses should be sworn. But the testimony is not set forth in the record.[3]

**83.** Whenever the only officer present with a command sits as summary court, no approval of the sentence is required by law, but he should sign the sentence as such officer and date his signature.[4]

**84.** The statement of the accused as to whether or not he consents to trial by the summary court should be made and signed by him on the original charges, and a note of this statement in each case will also be entered on the record of the summary court and on the monthly report of trials of such court.[5]

**85.** Delay beyond twenty-four hours does not invalidate the proceedings, but may be considered in awarding the sentence. The commanding officer determines what cases shall come before the court and when they shall come before it. Trials by this court are not to be held on Sunday except when the exigencies of the service render it necessary.[6]

[1] Circular 32, War Department, 1905.
[2] Dig. Op. J. A. G. 2406.
[3] Id. 2398. See Appendix E, 5.
[4] A. R. 966.
[5] A. R. 963.
[6] A. R. 968.

**86.** Whenever, under the summary court act or the 83d Article of War, it becomes necessary to convene a garrison or regimental court, the order appointing it will state the facts which bring the cases to be tried within the exceptions of those laws.[1]

### THE REGIMENTAL COURT-MARTIAL FOR DOING JUSTICE

**87.** The regimental court-martial for doing justice is a different tribunal from the regimental court for the trial of offenders and is provided for by Article 30 of the Articles of War, which is as follows:

Article 30.—Any soldier who thinks himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial.

The composition and organization of this court is the same as that of the regimental court-martial, and its proceedings are recorded as nearly as practicable in the same manner as the proceedings of general courts-martial, but its powers are not the same, its purpose not being for the trial of cases, but only to hear complaint and recommend the action to be taken to remedy the wrongs complained of, or to redress the grievance if it is found to exist, such as erroneous stoppages of pay, irregularity of detail, etc.

The members of the court are subject to challenge by the parties,[2] and the members and the judge-advocate are sworn to faithful performance of their duties. Both

[1] A. R. 969.
[2] Winthrop, Vol. 1, p. 862; Ives, p. 138.

parties furnish a list of their witnesses to the judge-advocate, appear before the court, and may be sworn themselves or submit proper documentary evidence, and examine and cross-examine witnesses.

**88.** Being purely a regimental court it can only act upon matters affecting enlisted men and officers of the regiment. The regimental commander only is competent to convene such court, and it cannot properly take cognizance of matters beyond the power of the regimental commander to redress. While its purpose is that of investigation, and not of trial, it cannot usurp the functions of a court of inquiry; if the remedy proposed by the court is beyond the power of the regimental commander, he cannot enforce it and must submit the case to the proper authority for remedial action.[1]

The evidence being received, the court's conclusions of fact must appear in the record, together with the recommendation of action to be taken, and must be approved by the regimental commander before becoming effective; when approved he issues the order for carrying the recommendation of the court into effect.

**89.** Either party may appeal, and the appellant must apply through the proper military channels to the department commander or other authority competent to order a general court-martial. Before such court the investigation is pursued as if on a first hearing, but by consent of both parties the record of testimony received by the regimental court may be admitted. If the appeal is found to be groundless and vexatious, the action taken is summary in character; the charge is formulated by the court, and the appellant is given opportunity to show cause why sentence should not be passed upon him. The proceedings, finding and sentence are submitted to the reviewing authority as in other cases of general court-

[1] Davis' Military Law, pp. 226, 227.

martial, and are acted upon and carried into effect in the usual manner.[1]

These courts are seldom resorted to, all wrongs and grievances being usually acted upon, and remedies ordered at once, by the commander, when appeal is made to him through the proper military channels.

[1] Davis' Military Law, p. 228.

## CHAPTER VIII

### ARREST AND CONFINEMENT

**90. Arrest.**—Arrest is any seizure by power, physical or moral. It may be made by seizing or touching the body; but it is sufficient if the party be within the power of the officer and submit to arrest.

In civil life it is usually effected through means of a criminal process called a warrant, issued by proper judicial authority, though arrest may be made without a warrant by an officer, and even by a private citizen when the peace is being broken in his presence or a felony has actually been committed and he has reasonable ground to believe that the person he arrests is the perpetrator.[1] No warrant is required for the arrest of soldiers by military authority.[2]

The person arrested in civil life is held in bodily restraint in charge of an officer or, in bailable cases, allowed to go free under bail to appear at the time and place appointed for his trial. If he fails to appear his bail is forfeited, but that does not free him from subsequent arrest and trial when he can be found. In military arrest bail is not taken, but where an officer is arrested but not confined under guard, the penalty of dismissal for breach of arrest is a sufficient equivalent, as is the severe punishment awarded to an enlisted man for that offense.

In preserving peace within a fort, an officer is authorized

[1] Clark's Cr. Proc. p. 46; Hawley on Arrest, 49; Am. & Eng. Encyc. of Law, Vol. 2 (2d ed.) 888.

[2] Hutchings v. Van Bokkelen (1852), 34 Me. 126; Fed. Stat. Annotated, Vol. 1, p. 496.

to employ all reasonable means, but the means used should be measured by the necessity of the case. The law will not justify the killing of a single unarmed soldier, though drunken, riotous, or even mutinous, when he could be arrested without resort to such extreme means.[1]

An order, however, given by a military officer to a private under his command should be obeyed by the private, and will be his full protection in a criminal prosecution, unless the illegality of such order is so clearly shown on its face that a man of ordinary sense and understanding would know when he heard it read, or given, that the order was illegal.[2]

**91.** The period for which an officer or soldier put in arrest may be confined is limited by the 70th Article of War to "eight days, or until such time as a court-martial can be convened," and Article 71 provides: "When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest."

**92. Arrest of Officers.**—In the military service officers are placed in arrest by order of the proper superior, either written or verbal, given in person or through his

[1] U. S. v. Carr (1872), 1 Wood U. S. 480.
[2] In re Fair, 100 Fed. Rep. 149.

representative, usually the adjutant. No forcible measures are taken to arrest, or to keep under restraint by force, except in extreme cases where escape is feared, and then it is usual to place a sentinel over the accused. An arrest may be ordered by the commanding officer in person or through a staff officer, orally or in writing.[1]

**93. The 65th Article of War** directs that "officers charged with crime shall be arrested and confined in their barracks, quarters or tents, and deprived of their swords by the commanding officer. And any officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed from the service."

The word "crime" is employed in this article in a general sense, and refers to all offenses of military as well as of civil character which are cognizable by a court-martial.[2]

The "commanding officer intended in this article is the commander of the regiment, separate company, post, department, etc., in which the officer is serving. Where a company is included in a post command, the commander of the post, rather than the company commander, is the proper officer to make the arrest of a subaltern of the company."[3]

The offense must be a serious one; officers are not to be placed in arrest for light offenses. A medical officer charged with the commission of an offense will not, in ordinary cases, be placed in arrest until the court-martial for his trial convenes if the service would be inconvenienced thereby, unless the charge is of a flagrant character.[4] The omission of the arrest does not in any way affect the jurisdiction of the court-martial.[5]

**94.** An exception to the rule that commanding officers

[1] A. R. 930.
[2] Dig. Op. J. A. G. 170.
[3] Dig. Op. J. A. G. 503.
[4] A. R. 932, 933; G. O. 159, War Dept. 1908.
[5] Dig. Op. J. A. G. 502.

only have power to place officers in arrest is found in the 24th Article of War, which gives to "all officers, of what condition soever," power "to part and quell all quarrels, frays and disorders, whether among persons belonging to his own or to another corps, regiment, troop, battery or company, and to order officers into arrest and non-commissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith."

The word "officers" coupled with the words "of what condition soever," in this Article, is held to include all classes of officers, non-commissioned as well as commissioned, being an exception to the meaning of the term "officer" contained in the first paragraph of Sec. 1342, Revised Statutes, enacting the Articles of War. In all cases, however, when a junior acts, he should at once report to the commanding officer a statement of the facts, making him "acquainted therewith."[1]

**95.** The arrest and detention of a retired officer, by the military authorities, under charge of violation of the Articles of War are authorized by the 65th Article of War; and the civil courts will not interfere to procure his discharge on *habeas corpus* proceedings. And this is so, though the officer is arrested in his own house and is taken therefrom and held in close confinement in a military barracks, before specific charges as to the military offense committed by him have been formulated and served on him.[2]

**96. Status of an Officer in Arrest.**—An officer arrested will repair at once to his tent or quarters, and there remain until more extended limits have been granted by the commanding officer. Close confinement will not be enforced except in cases of a serious nature.[3]

[1] Davis' Military Law, pp. 393, 394.
[2] Closson v. U. S., 7 App. Cases (D. C.) 460; Fed. Stat. Annotated, Vol. 7, p. 1032.
[3] A. R. 931.

**97.** The order of arrest given an officer includes confinement in his barracks, quarters or tent, with deprivation of the right to wear his sword, and "any officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed the service." [1]

**98.** Officers in arrest are ordinarily considered as on parole, but when accused of having broken their arrest, or of any heinous offense, the penalty of which might induce a desire to escape from justice, they have, when under close arrest, been placed in the custody of the provost-marshal or in charge of a sentry.

An officer in arrest will not wear his sword nor visit officially his commanding officer or other superior officer, unless directed to do so. His applications and requests of every nature will be made in writing.[2] On the march, field officers and non-commissioned staff officers in arrest will follow in rear of their respective regiments, and company officers and non-commissioned officers in arrest in rear of their respective companies, unless otherwise specially directed.[3]

**99.** The actual taking of his sword from a commissioned officer as provided in the article of war is not an essential part of his arrest; the fact that it was not taken does not invalidate the arrest or empower him to wear his sword while in arrest, the effect of the status of arrest being to suspend him from the functions of his office and to deprive him of the exercise of command.[4]

**100.** An officer by being placed in charge of a provost-marshal, or by having a guard placed over his quarters, is not thereby relieved from the responsibility of arrest.[5]

**101.** The officer in arrest is on honor to keep within

[1] 65th Article of War, post, par. 772.
[2] A. R. 934.
[3] A. R. 935.
[4] Winthrop's Abr., 3d Ed., p. 47.
[5] Simmons on Courts-martial, Sec. 355.

the limits of his arrest and to await the issue of his trial.[1]

**102.** The penalty of dismissal is sufficient to enforce the observance of the arrest and is an equivalent to the bail in civil causes, the penalty being in most cases greater than the forfeiture of bail in large amount. When the arrest continues for any time the limits are usually extended by the commanding officer who designates such extension in the order granting it; until extended the officer is in close arrest and confined to his quarters strictly.

**103.** The penalty of the 65th Article of War has been held to apply to "close arrest" only, and not to cases where the limit has been extended. As, however, the extension is given for the benefit of the officer, a strict construction would hold him to the same accountability as in close arrest; but as restrictive laws are given a liberal construction it has been held by the Judge-Advocate-General that breach of an arrest not accompanied by confinement to quarters is not an offense under the 65th Article of War, but under the 62d.

An unintentional or inadvertent violation of the arrest, in either case, constitutes a constructive breach of arrest, but does not involve the odium of, or constitute the offense attached to, a voluntary breach thereof. The fact should, however, be immediately reported to the commanding officer, stating the circumstances of the case, thereby satisfying him that it was not intentional. Failure to do this may lay the officer open to suspicion of intent to commit the breach and an endeavor to conceal it.

**104. Arrest of Enlisted Men.**—Non-commissioned officers, except in aggravated cases or where escape is feared, and soldiers who have committed minor offenses, subject to trial by summary court, are placed in arrest

[1] Davis' Military Law, p. 63; Tytler, Essay on Military Law, pp. 202, 203.

in their barracks or quarters. Private soldiers under more serious charges are confined to the post guard-house.

Except as provided in the 24th Article of War, or when restraint is necessary, no soldier will be confined without the order of an officer, who shall previously inquire into his offense.[1] And an officer authorizing such arrest or confinement must report the fact as soon as practicable to the prisoner's company or detachment commander.[2]

**105.** No provost-marshal or officer commanding a guard can refuse to receive or keep a prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing him, at the time thereof, delivers an account in writing, signed by himself, of the crime charged against the prisoner.[3] And every officer to whose charge a prisoner is committed must, within twenty-four hours after such commitment or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such person, the crime with which he is charged, and the name of the officer committing him.[4] If there be any prisoner with no record of charges against him, the old officer of the day must report that fact to the commanding officer for his instructions.[5] The facts required to be reported by Article 68, and as to there being no record of charges, appear in the guard report book, presented to the commanding officer by the old officer of the day when he reports to be relieved by the new officer of the day, immediately after guard-mounting.

**106.** The period for which officers and soldiers under arrest may be kept in confinement is limited to eight days, "or until such time as a court-martial can be assembled."[6]

[1] A. R. 938.
[2] A. R. 939.
[3] Article 67; see Chapter XXXI, post, par. 774.
[4] Article 68; see Chapter XXXI, post, par. 775.
[5] A. R. 942.
[6] Article 70; see Chapter XXXI, post, par. 777.

## CHAPTER IX

### ARREST OF PERSONS IN MILITARY SERVICE BY CIVIL AUTHORITIES

**107.** Persons in the military establishment may, in time of peace, be arrested for a capital crime, or any offense against the person or property of a citizen, and be tried therefor by the civil courts. To secure this arrest Congress has enacted the 59th Article of War.

Article 59.—When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment to which the person so accused belongs are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.

The term "laws of the land" in this article has been construed to include "municipal ordinances and by-laws"; and a soldier may be arrested and tried by civil authority for violation of a city ordinance.[1] This article leaves no

[1] Cir. 15, Headquarters of the Army, A. G. O., 1894.

discretion to the commanding officer; upon the application being made, he must use his utmost endeavors to aid the civil officers in apprehending and securing the accused in order to bring him to trial. The application required by this Article should be made in case of a crime committed before enlistment, as well as after it.[1]

**108.** The commanding officer, before surrendering the party, should require the application to be sufficiently specific to identify the accused and to show that he is the person charged with a crime or offense within the class described in the Article. Without compliance with such requirement the officer cannot surrender nor the civil authorities arrest, within a military command, an accused officer or soldier.

If the commanding officer is doubtful whether the application is made in good faith and in the interest of law and justice, he will require it to be explicit and be sworn to; and, in general, the preferable and only satisfactory course will be to require the production, if practicable, of a due and formal warrant or writ for the arrest of the party.[2]

**109.** Soldiers not within the immediate control or jurisdiction of the military authorities, as an officer on leave or an enlisted man on furlough, may be arrested in the same manner as any citizen.

**110.** The Article does not apply to civilians employed or residing at a military post accused of civil crime, and application cannot be required to be made to the commanding officer before arresting the party; but it should be made or notice given him as a matter of comity.[3] Nor does the Article apply to offenses against the laws of the United States, or to those committed in places over which

[1] Dig. Op. J. A. G. 95.
[2] Id.
[3] Dig. Op. J. A. G, 103.

the United States has exclusive jurisdiction. It applies only to officers or soldiers accused of an offense. It does not apply to the service of a subpœna to appear as a witness before a civil court. In such case the civil official should, as a matter of comity, first apply to the commanding officer, and where the application for such service is so made the commanding officer will, as a matter of comity in return, facilitate the service and issue the necessary permit or order to enable and cause the officer or soldier to attend the court.[1]

**111.** When a soldier is serving a sentence of confinement imposed by a court-martial, he cannot, in general, properly be surrendered under this Article. The civil authorities should defer their application till the military punishment is executed or remitted.[2]

**112.** In cases where the act committed constitutes an offense against both military and civil law, that authority which first assumes jurisdiction of the case retains it until completed, and charges should be immediately preferred.[3] If the accused has been arrested and is under charges for trial by the courts of either jurisdiction, the authorities of the other should await the result of the operations and judgment.

If both courts—military and civil—derive their powers and authority from the same Government, trial by either may be pleaded in bar of trial by the other. But such plea will not avail as between courts-martial and civil courts which derive their powers from different Governments.[4]

**113. Service of Process on Military Reservations over which Jurisdiction has not been Ceded.**—Where a military post is within the territorial boundaries of a State, and there has been no cession of jurisdiction by the State, the State officials have the same right and authority to serve process there, and its courts have the same jurisdiction over acts done and crimes committed within

[1] Dig. Op. J. A. G. 104. [2] Dig. Op. J. A. G. 98.
[3] A. R. 963; G. O. 128, War Dept. 1908.
[4] Grafton v. United States, 206 U. S. 333; Cir. 43, War Dept. 1907.

the limits of the post, as elsewhere in the State; the ownership or occupation by the United States not excepting it from the operation of State laws.[1] Likewise, where a military post is located in a Territory, the territorial courts are authorized to issue process for the arrest of officers and soldiers charged with crime, or to serve process in civil actions and to attach, replevy upon, or take in execution property belonging to them within the post, not specially exempted from seizure, and commanding officers of such posts should interpose no obstacle to due service, within their commands, of the legal process of the territorial courts, these courts not existing under a sovereignty distinct from that of the United States, but being established under the provision of the Constitution empowering Congress "to make all needful rules and regulations respecting the territory belonging to the United States."[2]

**114. Service of Process on Reservation where Jurisdiction has been Ceded by the State.**—As a general rule, military posts situated within the limits of a State are occupied under a grant with cession of jurisdiction given by the State. In most cases the State reserves the right to serve process within the ceded territory in both criminal and civil cases arising outside the same.

**115.** Crimes committed within the ceded territory are cognizable by the United States authorities only;[3] but persons, whether soldiers or citizens, who commit crimes outside that territory and have violated the State laws cannot take refuge upon the United States reservation and be exempt from arrest. In fact the commanding officer should, when requested, assist in the arrest of such criminals.

[1] Davis' Military Law, p. 460; Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 527, 533.
[2] Davis' Military Law, p. 461.
[3] Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 532, 533; In re Ladd, 74 Fed. Rep. 41.

**116.** All military persons are amenable to suit in the civil courts in cases arising out of their personal relations and responsibilities to civilians, or for damages arising from any excess of authority to the detriment of another, or for illegal or excessive punishment imposed or an unauthorized arrest or confinement.[1]

[1] Winthrop's Abr., pp. 340, 341.

## CHAPTER X

### CHARGES AND SPECIFICATIONS

**117.** The charge designates in general terms the offense committed, while the specifications state the specific acts which constitute the offense designated in the charge. They ought to be drawn up with all the essential precision, certainty and distinctness which the prisoner is entitled to demand in an indictment at common law; though they need not be drawn in the same technical forms.[1]

Each charge must be sustained by one or more specifications, each of which must allege facts which sustain the charge, and which brings the offense within the jurisdiction of a court-martial. It is not necessary that the charge and specification should be drawn up with all the formality and use of technical terms of a civil indictment, but it is sufficient that they show the offense committed with the time, place and circumstances which will bring it within the jurisdiction of the court-martial, and they must be so fully and clearly stated that the accused can ascertain therefrom the offenses with which he is charged and from what accusation he must defend himself. The offense charged must be laid under the proper article of war and the facts constituting it be clearly stated, and the name of the accused, his rank,

[1] 3 Greenleaf, Ev., Sec. 471.

and the organization to which he belongs, together with the place and date of the commission of the offense, must be given. If the exact time and place cannot be specified, it will be sufficient to state it as committed "at or near" a certain place specified, and "on or about" a certain date specified. Whenever an act charged against an officer under a specific article of war likewise constitutes conduct unbecoming an officer and a gentleman, it may also be charged under the 61st Article of War.[1]

**118.** An error in the name, rank, etc., as drawn in the charge, may be corrected before arraignment. If, however, the accused pleads under a wrong name or title, he may, if found guilty, be punished, for he cannot take advantage of his own wrong.

**119.** When an article of war includes more than one offense a charge laid under that article should state in its specification the particular offense committed, and not be drawn in the alternative form. The use of the alternative form is not permissible, as the accused is entitled to know the specific offense with which he is charged and cannot be required to defend himself as against a charge of either having committed one offense or else the other; the officer preferring the charges must state the explicit offense charged. It would be improper, for example in a charge under the 17th Article of War, to state in the specification that the accused did "lose *or* sell" his arms, clothing, etc.[2]

**120.** Military usage and procedure permit of an indefinite number of offenses being charged and adjudicated in one proceeding. The accused may be arraigned upon several charges at one trial, and an approved finding of guilty on one of them, a conviction of which requires or authorizes the sentence adjudged, will give validity and

[1] See Carter v. McClaughry, 183 U. S. 365.
[2] See post, Chapter XXXI, par. 724.

effect to such sentence, although the similar findings on all the other charges are disapproved.[1]

**121. Intent.**—Whenever "intent" is a necessary element of a crime, that intent must be set forth in the specification; for example, in a charge of larceny the specification should show not only the "taking and carrying away" but the intent to convert to his own use. When it is an essential ingredient of an offense, the allegation of intent may be made by the use of the words "wilfully"; "knowingly"; "feloniously"; "corruptly," etc., in the specifications. The words "knowingly" and "wilfully" occur in certain articles of war, and the word "feloniously" is properly used to describe an intent when the act constitutes an offense punishable by imprisonment in a State prison or penitentiary. Some Articles of War, as the 13th, 20th, and 39th, contain no reference to intent.[2]

**122. Who may Prefer Charges.**—Any army officer may prefer charges against another officer whatever their relative rank, or against any non-commissioned officer, soldier or other person amenable to military law. An officer may prefer charges even though himself, at the time, under charges. But a person may be tried for preferring false charges.[3] Charges should be signed by a commissioned officer, but a contract surgeon or dental surgeon may sign charges against an enlisted man.[4]

**123. Who may Initiate Charges.**—Charges may be initiated by soldiers through complaint made to their, proper superior, or by persons not in the military service through statements supported by satisfactory evidence furnished to an officer who may sign such charges and thereupon assume the responsibility therefor. In sup-

[1] Dig. Op. J. A. G. 2311; Carter v. McClaughry, 105 Fed. Rep. 614; Id., 183, U. S. 386.
[2] Davis' Military Law, p. 70 and note.
[3] Ives, p. 84.
[4] Court-martial Manual, p. 20; A. R. 1413.

port of accusations of facts not within his own knowledge, the officer should investigate the truth thereof, and require affidavits or other satisfactory evidence to be furnished him sufficient to satisfy himself that the charges can be proved before the court-martial.

**124. To Whom Sent.**—Charges should be sent through proper military channels to the officer authorized by law to convene a court-martial for the trial thereof. In general court-martial cases it is required that the commanding officer of the post, or some officer designated by him, other than the officer preferring the charges, shall investigate them before they are forwarded, and the commanding officer must state in his endorsement thereon in forwarding them the name of the investigating officer, and also whether or not, in his opinion, the charges can be sustained. If the offense is one for which it is possible for civil courts to claim jurisdiction the charges must be preferred immediately.[1]

**125. Accumulative Charges.** — The accumulation of charges by holding back trial of certain offenses until several have been committed and then bringing them all before a court-martial is irregular and not favored, having the appearance of a desire to punish rather than to maintain discipline.

**126. Alteration of Charges.**—Charges submitted against any person may be altered and corrected by the convening authority before forwarding them to the judge-advocate of a court-martial for trial. The judge-advocate cannot alter or change the charges sent him in any material matter, otherwise they would not be the charges referred which he was authorized to bring to trial before the court; neither he nor the court-martial can originate and try charges not referred to them for trial by the convening officer; nor can charges referred to them be withdrawn and new ones submitted by direction of the court; nor

[1] A. R. 963; G. O. 128, War Dept., 1908.

can the court direct any amendment that will materially modify the charges; they must be brought to trial as they stand, and, after arraignment, the accused can only be tried upon the charges to which he has been called upon to plead.

The judge-advocate may, however, correct a manifest minor error, in name, date, or number, etc., but he must not make any material, substantial amendment without the authority of the convening officer.

**127. Additional Charges.**—After the original charges have been preferred and trial ordered thereon, new charges for offenses additional to those already charged may be drawn and referred for trial by the same court-martial and at the same time as the original charges. They must, however, be received and the accused arraigned upon them at the same time as on the original charges, in order to be included in the same trial with them. If they are not, a separate trial on them will be necessary, since the court can try only those charges which are before them at the time of taking the oath which requires that they "try and determine the matter *now* before them."

**128. Service of Charges.**—When an officer is placed in arrest for purpose of trial, except at remote military posts or stations, a copy of the charges on which he is to be tried must be served upon him within eight days after the arrest, or the arrest will cease.[1] This service consists in delivering to the accused personally a copy of the charges and specifications against him. The delivery may be made by the adjutant, the judge-advocate of a court appointed for the trial of the case, or by any officer directed by proper authority to make it.

**129.** Enlisted men should be informed of the charges and specifications against them, and it is the duty of the judge-advocate to furnish the accused with a copy of the charges on which he is to be tried, within reasonable

[1] Art 71. See Chapter XXXI, post, par. 778.

time previous to trial, to enable him to prepare his defense and summon his witnesses. Any person indicted for a capital offense in a United States court has a right to have the list of witnesses delivered to him at least two entire days before the trial, and, in case of treason, three days before it.[1]

The accused is entitled to be informed of the nature and cause of the accusation against him by a particular statement of all that is material to constitute the offense set forth with reasonable certainty as to time and place, and in the customary forms of law.

If the charges are materially changed or additional charges are drawn, it is the right of the accused to have copies thereof, with reasonable time to meet them.

### PAPERS THAT SHOULD ACCOMPANY CHARGES

**130. General Courts.**—Charges against enlisted men forwarded to the authority competent to order trial by general court-martial must be accompanied by a statement of service of the accused, showing dates of present and former enlistments, his character, as given on each discharge, and the date of confinement for the offense alleged in the charge; proper evidence of previous convictions, together with a brief statement of the evidence expected from each witness, and of any other available evidence in the case, must also accompany the charges,[2] and, in case of desertion, a report of the physical examination made by the medical officer at the post where the deserter is received.[3]

The statement of service will not be introduced in evidence, and is not made part of the record, but will be considered by the court and shown to the accused, with

[1] Sec. 1033, Revised Statutes; Logan v. U. S., 144 U. S. 263.
[2] A. R. 962.
[3] A. R. 125.

a view to correction by the introduction of evidence should it be required. It will be returned by the judge-advocate with the charges, which it accompanies, and will be forwarded with the record for file in the office of the Judge-Advocate-General. The evidence of previous convictions is appended to the record, each with its proper mark, as referred to in the body thereof.

**131. Inferior Courts.**—Charges against an enlisted man for trial by garrison, regimental, or summary court must be accompanied by proper evidence of previous convictions, but, in the summary court alone, if the evidence of such convictions is contained in its record, a reference to it will be sufficient, and if this evidence is not submitted or cited the court may take judicial notice of any such evidence which that record contains.[1]

[1] A. R. 964.

## CHAPTER XI

### ORGANIZATION OF COURTS-MARTIAL

**132.** Charges having been received and approved by an officer authorized to convene a court-martial, such court is convened by his order. This order is dated at his headquarters, and designates the names of the officers who will constitute the court-martial, and the judge-advocate, together with the time and place at which the court will meet. The charges and specifications, with the accompanying papers, are then sent to the judge-advocate, who must make the necessary preparations for the meeting of the court and trial. The number of members and their eligibility for detail is regulated by the 75th Article of War.

Article 75.—General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service.[1]

**133.** Since the word "officer" as used in the Articles of War designates commissioned officers,[2] such officers only can sit upon courts-martial.[3]

Commissioned officers are those who have been duly appointed and commissioned by the President and have received their commissions. When they have been appointed by the President and confirmed by the Senate

[1] See par. 46, supra.
[2] Sec. 1342, Revised Statutes U. S.
[3] See par. 47, supra.

and have received their commissions it is a permanent appointment. The appointments and commissions given by the President during the recess of the Senate are also constitutional appointments, but temporary, as they expire, if not confirmed by the Senate, at the end of its next session. Meanwhile they are as regular and legal and effective as permanent appointments, conferring the same rights for the time being and among them eligibility to sit as members of a court-martial.

134. **Militia.**—Under the law, militia officers must constitute the majority membership of all courts-martial for the trial of officers and enlisted men of the Militia, when in the service of the United States.[1]

**Volunteers.**—Both militia and volunteer officers may be members of a court-martial for the trial of volunteers.

**Regulars.**—Militia, volunteer, and regular officers, and Officers of the Marine Corps detached for service with the Army, by order of the President, may sit upon courts-martial for the trial of officers and enlisted men of the regular forces.[2]

Regular officers are prohibited from sitting upon courts-martial for the trial of officers or soldiers of "other forces" by the 77th Article of War, except in case of forces of the Marine Corps detached for service with the Army.[3]

135. **Rank of Members.**—All commissioned officers of the staff or line, having actual military rank, are eligible for detail as members of a court-martial. Members sit upon the court according to their relative rank, the senior in rank always being president of the court. Military rank, as well as commission as an officer, is necessary for the reason that, by Article 95, members give their votes according to rank; and, by Article 79, no officer shall, when it can be avoided, be tried by officers inferior to him in rank; and, by custom of service, officers are seated on the court in order of rank. By the Act of April 23, 1904,

[1] Act May 27, 1908; G. O. 99, War Dept. 1908.
[2] See ante, par. 50, 51. [3] See ante, par. 50.

*retired officers* are, with their consent, eligible for detail on courts-martial and may be assigned to such duty by the Secretary of War.

**136. Number of Members.**—The number of members as required by the 75th Article of War may vary from five to thirteen, the former being the minimum and the latter the maximum number to constitute a legal court-martial. Five members constitute a quorum, but a lesser number may meet and adjourn, and if five members are present and one is objected to, the other four may try and determine the challenge; but in every case, throughout the trial, at least five members must be present and duly sworn to try the case.

In revision proceedings, also, at least five members of the court which tried the case must re-assemble to consider and act upon matters connected with the case referred to it by the convening authority, and their final action will be the action of the court.

**137. Determination as to Number of Officers.**—The question as to the number of officers, between five and thirteen, to constitute any general court-martial is determined by the convening officer, taking into consideration the demands and exigencies of the service at the time. His decision within those limits, as contained in the order constituting the court, is conclusive.[1]

**138. New Members.**—Whenever a court-martial is, from any cause, reduced below the minimum, the court should adjourn, reporting the fact to the convening authority. New members may then be added. If the reduction below the minimum takes place during a trial and after testimony has been taken, the court should preferably be dissolved and a new court ordered.[2] If a new member is added after the trial is begun, he is open to challenge,

[1] Martin v. Mott, 12 Wheat. (25 U. S.) 19; 6 Op. Attorney-General, 506.

[2] Court-martial Manual, pp. 12 and 29.

as any other member; he must be duly sworn if accepted; and all the testimony previously taken should be read to him in the presence of the parties. If any member is absent during the introduction of evidence, he should not thereafter take part in the trial. But if he reports again for duty with the court, all evidence and material proceedings taken in his absence must be read to him before he begins to act upon the court, and, no objection being made, and the court permitting him to sit, his sitting will not invalidate the proceedings.

**139.** The promotion or advancement in rank or grade of a member does not affect his competency, but if dismissed or discharged from the service he is no longer a commissioned officer and cannot act upon the court. If retired he is only eligible to sit after giving his consent thereto and being assigned to such duty by the Secretary of War.[1]

**140.** The 79th Article of War provides as follows:

Article 79.—Officers shall be tried only by general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank.

This, like determining the number of officers that shall constitute the court, is left to the discretion of the convening authority. The fact that an officer sitting upon a court-martial is junior in rank to the accused is, of itself, no legal ground for challenge. But where such member has a direct and immediate interest in the result if the accused should be convicted, as where he stands first in the list for promotion, and the conviction of the accused might result in his dismissal and give the member his advanced grade, this would constitute good cause for challenge on ground of interest in the result.

**141. The President of a Court-martial.**—The president of a court-martial is not announced. The officer

[1] Act April 23, 1904; G. O. 76, War Department, 1904.

highest in rank present will act as the president.[1] He presides over the deliberations of the court with the same authority and power as the chairman of any deliberative body in parliamentary procedure; acts as the mouthpiece and representative of the court in declaring its decisions and rulings, and in the preservation of order and the regularity of its proceedings; and sees that everything is conducted in a manner befitting a court of justice.[2] His vote, however, in any matter whatever before the court, has no more weight than that of any other member, nor is any member bound to follow his opinion. He calls the court to order at the proper time, and sees that order is preserved in the court-room both by members and others present. He administers the oath (Article 85) to the judge-advocate after the court has been duly sworn by the latter, but he exercises no command over the judge-advocate or members of the court and is on the same status as to being subject to challenge, etc., as any other member. It is his duty, with the judge-advocate, to authenticate by his signature the record of the proceedings of the court-martial and also to sign all acts, orders, etc., requiring it, such as interrogatories for depositions prepared during the session of the court, etc.

**142. Seating of Members.**—The members of the court-martial take their places on it according to rank, the senior presiding, the next in rank sitting on his right and the next senior on his left, and so alternating from right to left according to rank until the junior is last, near the foot of the table. The judge-advocate usually sits at the foot or at a smaller table near it.

In important cases or where it is deemed desirable, the members are arranged to sit on one side of the table, the president in the center and the other members on

[1] A. R. 954.
[2] See Manual of Military Law, War Office (England), 1894, p. 640.

his right and left, alternately, according to rank; the judge-advocate and the reporter being at a separate table opposite the president, with each witness, when testifying, on his right. The accused and his counsel are seated at a table on the other side of the witness from the judge-advocate, facing the court. This enables the members of the court to better hear the judge-advocate, the accused and his counsel, and to observe the witness while delivering his testimony.

**143. Conduct of Members.**—A court-martial has no power to punish its members, but, by Article 87, "all members of a court-martial are to behave with decency and calmness," and for disrespectful language or disorderly conduct any member may have charges preferred against him as for other offenses against military discipline. Improper words used by him should be taken down in writing, and any disorderly conduct reported to the appointing authority.[1]

**144.** The court-martial corresponds in its character to the civil court, and includes in its powers the functions there exercised by both the judge and the jury. The conduct of members should be accordingly dignified and attentive. Inattention of a member is reprehensible, and any act indicating it tends to lower the dignity of the court.

**145. Quorum.**—So long as the number of its members constitute a legal quorum its membership may be changed, without affecting the legality of the court, by the relief and assignment to other duty of some of its members or by addition of new members; but the membership of a court should never be changed if it can be avoided after it has entered upon the trial of any case.

**146. Performance of Other Duties.**—A member of a court-martial stationed at the place where it sits is liable to duty with his command during adjournment from

[1] A. R. 955.

day to day. Courts will, as far as practicable, hold their sessions so as to interfere least with ordinary routine duties.[1] It is usual, however, to excuse the judge-advocate from other duties in important or extended cases, because of the necessity of preparation of the record for each day's sessions, and other duties connected with the meeting of the court, such as the examination of cases, subpœnaing of witnesses, etc.

**147. Uniform.**—Courts-martial, courts of inquiry, and boards of officers will hold their sessions in such uniform as the court or board shall decide.[2] Sabers are worn in each case by the members; the judge-advocate and the counsel, if a military person, appear in the same uniform as the members, but without side-arms. Military witnesses wear the same uniform as the members, with side-arms.

[1] A. R. 953.
[2] G. O. 169, War Dept. 1907, p. 60.

## CHAPTER XII

### THE JUDGE-ADVOCATE—COUNSEL FOR ACCUSED

**148.** The appointment of a judge-advocate is provided for by the 74th Article of War.

Article 74.—Officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same.

The order convening a general, garrison, or regimental court-martial designates the officer who is to act as the judge-advocate. He is not a member of the court and has no voice in its decisions. His duty is that of a prosecutor of the case for the United States, subject to the limitations of the 90th Article of War, which requires him, after the prisoner has made his plea, to "so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner the answer to which might tend to criminate himself." He must act as adviser of the court upon questions of law when requested by it, but not otherwise; all his legal opinions must be given in open court, the accused and his counsel having the right to be present and hear them. In his opinion he must confine himself to the question asked and in no manner attempt to influence the court.

**149.** The judge-advocate is not subject to challenge, but if he is the actual accuser and a material witness with a hostile animus in the case, such as would prevent

his dealing fairly and justly with the accused, the fact should be made known, by the judge-advocate himself, to the convening authority, who would properly relieve him in that case. A member cannot act as judge-advocate, nor has the court any authority to name a judge-advocate in his absence. If the absence is for any considerable time the court should report the absence to the convening authority for his information, and adjourn, awaiting his action.

**150. Preparation for the Trial.**—The judge-advocate having received the order convening the court and appointing him judge-advocate thereof, with the charges preferred and accompanying documents, should furnish the accused with a copy of the charges, inform him as to his right to ask for counsel, and notify him of the date and place of meeting of the court, in sufficient time beforehand for him to prepare his defense and secure his witnesses, a list of whom he must furnish to the judge-advocate, who will take the necessary steps to secure their attendance. The judge-advocate also prepares his own case for the prosecution by examination of the witnesses as to the charges and specifications, and the law and decisions affecting the particular offense charged, and, if the case is an important one, applies to the convening officer for authority to employ a stenographic reporter; he is also authorized to request the commanding officer to detail an enlisted man to assist him in preparing the record.[1] He must see that the charges and specifications are correctly drawn, and should report at once, and before the court convenes, to the convening authority any mistake or irregularity in the order convening the court, or any, except minor errors, discovered in the charges and specifications.

Before the date of the meeting of the court he applies to the quartermaster for a room suitable for the use of

[1] A. R. 995, G. O. 132, War Dept. 1908. See Reporter, par. 162–164.

the court, with necessary tables, chairs, etc., and for the stationery likely to be used, and he must see that all these things are in readiness before the hour fixed for the meeting of the court.

**151. Duties during Trial.**—The court having met and organized, the judge-advocate presents his cases and conducts the prosecution in such manner as will best and most clearly place the facts before the court. Unless otherwise directed by the convening authority he determines the order in which cases referred to him for trial shall be brought before the court and the best method of conducting them, and he cannot be directed by the court as to his manner of presenting the case.

As recorder he must keep a full and accurate record of the proceedings and affix his signature to each day's proceedings. The entire record is authenticated by his signature and that of the president of the court.

**152. Closed Session.**—The court may go into closed session for the consideration of any matter coming before it, and always does so when considering the finding and sentence. When the court is to be closed the president of the court so announces, and all persons, including the accused, his counsel and the judge-advocate, withdraw from the room.[1]

Where there are many spectators present it is sometimes more convenient for the court itself to withdraw to an adjacent room for deliberation in closed session than to clear the room, and this is frequently done in such cases, the members returning to their seats upon the conclusion

[1] The Act of July 27, 1892, requires that, whenever a court-martial shall sit in closed session, the judge-advocate will withdraw; this withdrawal should be stated in the record. If not noted therein, however, the presumption is that when the record states that "the court was then closed," the law was complied with, and it will not invalidate the proceedings if the record should fail to state when the court was closed that "the judge-advocate then withdrew."

of their deliberation, and the president then announcing that the court is re-opened.

When the court is re-opened, the accused, his counsel and the judge-advocate being present, the decision of the court on any interlocutory question is announced. The finding and the sentence, however, are disclosed only to the judge-advocate. The judge-advocate, after the proceedings have been authenticated by the signature of the president of the court and himself, forwards the record to the convening authority.

When the court adjourns to meet at the call of the president, the president informs the judge-advocate of the time of reassembling, and the latter notifies the members of the court.

**153. Assembling of the Court.**—The members of the court meet at the time and place designated by the convening authority in the order appointing the court, and, at the hour named therein, repair to the room set apart for its use. The members being assembled, the senior in rank, being president, calls the court to order, and the judge-advocate calls the roll from the order convening it, during which the members, if not already in their places, seat themselves.[1]

In important cases the judge-advocate places before each member a copy of the order convening the court, and of the charges and specifications, the former that they may know the organization of the court and the legality of its constitution, and the latter that they may be made aware of "the matter now before" them[2] and that it is properly within their jurisdiction.

In minor cases, when members of the court are not furnished with separate copies thereof, it is usual to place the charges before the court as referred to it for trial,

[1] See ante, par. 142.
[2] See Oath of Members, Article 84, post, par. 174.

thus bringing the matter before them as contemplated in their oath.[1]

If any members are absent, it is the duty of the judge-advocate to ascertain, if possible, the cause thereof, and embody it in the record. A copy of any orders, surgeon's certificates, etc., authorizing absence should be appended to the record.[2]

If a quorum is present, the court attends to any preliminary business it may have on hand or that may come before it, which, being completed, the judge-advocate announces his readiness to proceed with the case referred to him for trial by that court.

**154. Introduction of the Accused; Counsel for the Accused.**—The court being in readiness the accused is brought before it, and may introduce counsel. In general court-martial cases this is usually some suitable officer detailed by the post commander on request of the prisoner to be furnished with counsel. If there be no such officer available for detail, the fact will be reported to the authority appointing the court for his action.[3] The accused is not of right entitled to counsel, but the privilege is almost invariably conceded, and, if refused, such refusal may be ground for the disapproval of the proceedings.[4]

**155.** The counsel may be either a civilian or a military person; in case the accused has no counsel the duties thereof devolve upon the judge-advocate. The duty of the judge-advocate is to bring out all facts connected with the case, those favorable to the prisoner as well as against him, the object of the court being not to convict or to acquit, but to administer justice. This is a fact that should not be lost sight of in all trials by courts-martial.

[1] See Oath of Members, Article 84, post, par. 174.
[2] See Appendix E, 4.
[3] A. R. 970.
[4] Dig. Op. J. A. G. 984; Court-martial Manual, p. 25.

**156.** The accused should not be in irons when brought before the court, unless there is reasonable ground to believe that he will attempt to escape or commit violence; and even then it is preferable to place an adequate guard over him.[1] But the fact that he was tried while in irons will not invalidate the proceedings,[2] nor will his escape while the trial is pending.

A court having once duly assumed jurisdiction of an offense and person cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine, according to law and its oath. Thus the fact that, pending the trial, the accused has escaped from military custody furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence in the case; and the court may and should find and sentence as in any other case.[3]

**157. Duty of Counsel for Accused.**—The duty of the judge-advocate, as counsel for the accused when he has no other counsel, is prescribed by the 90th Article of War, which states that "he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner the answer to which might tend to criminate himself." But it is now provided that the commanding officer of a post where a general court-martial is convened shall, at the request of any prisoner who is to be arraigned, detail a suitable officer as counsel for his defense. "An officer so detailed should perform such duties as usually devolve upon counsel for the defendant before civil courts in criminal cases. As such counsel he should guard the interests of the prisoner by all honorable and

[1] Dig. Op. J. A. G. 1047.
[2] Court-martial Manual, p. 21.
[3] Id. p. 15.

legitimate means known to the law, so far as they are not inconsistent with military relations." [1]

**158.** How far an officer detailed as counsel is expected to go in his defense of a prisoner is sometimes an important question to him, especially when he has been detailed without consulting his wishes or has since been made aware of the actual guilt of the accused by his confession to him, or otherwise. Where the accused confesses his guilt to his counsel, in the course of defense, the officer is under the same confidential relations with the accused as an attorney is with his client in civil practice, and cannot divulge the secrets confided to him. It is not his duty to advise the judge-advocate as to his procedure; the judge-advocate must be relied upon to conduct the prosecution according to the evidence in the hands of the government and has no right to any information solely in the hands of the accused or his counsel, unless he obtains it by legal means.

**159.** The counsel not only has all the duties prescribed by the 90th Article of War for the judge-advocate when acting as such, but it is also his duty to advise, and to secure, through the judge-advocate's process, the necessary witnesses for the defense; to test the witnesses for the prosecution by cross-examination; to insist upon the introduction of the best evidence and the exclusion of all that is irrelevant, immaterial or improper; to draw out evidence favorable to the accused, and to see that the prosecution is conducted in accordance with legal methods of procedure and the laws governing the introduction of evidence.

**160.** The counsel for the accused, in his capacity as such, is free to act upon his own judgment and to present such defense as will best show the entire innocence of the accused, or a lesser criminality than that charged.

[1] A. R. 970.

It will, therefore, not be inconsistent with his "military relations" for him to present all the evidence practicable for the defense, or to cross-examine carefully witnesses for the prosecution, even if they are his superiors in rank, and to compare their evidence with that of others or that given by the witness himself; but having made such comparison the conclusions should be left to the court. He will not be justified in undue criticism or aspersions made upon any witness, or upon the character of officers; such aspersions usually being subversive of discipline and tending to create prejudice rather than to promote justice. It is no part of the duty of the counsel for the accused to make use of technicalities, such as are sometimes used in civil criminal courts, for the purpose of causing delay in the proceedings or to mislead the court; he will never be justified in the use of misleading argument, disingenuous pleas or appeals to the passions, sympathies or prejudice, of the members of the court.

**161.** Every officer detailed as counsel ought to consider well his duty both to the accused and to the government, and his own judgment and experience will advise him as to what are "honorable and legitimate means," not inconsistent with his "military relations," by which he may defend the accused. The words "honorable and legitimate" should be construed together as governing his action in determining whether an act is inconsistent with his "military relations" or not.

**162. Reporter.**—The reporter, if one has been allowed (see par. 150), is then introduced and takes the following oath, administered by the judge-advocate: "You swear that you will faithfully perform the duties of reporter to this court. So help you God."

**163.** To assist him in keeping and making up the record of proceedings, the judge-advocate may be authorized, in important cases, to employ a stenographic reporter. This reporter must, before entering upon his duties, take the

oath or affirmation that he will "faithfully perform" the same.[1] The authority is limited to general courts-martial, military commissions, and courts of inquiry, when authorized by the convening authority.[2] Whenever the judge-advocate, therefore, desires a stenographic reporter, he must make application for authority to employ one to the convening authority, stating the circumstances which he believes makes such employment necessary. He must also confer with the paymaster, whose duty it is to pay his vouchers to witnesses and reporters, as to adoption of measures to prevent fraud in such payments.[3]

164. The commanding officer will, when necessary, detail an enlisted man to assist the judge-advocate of a general court-martial in preparing the record.[4] But no person in the military or civil service of the government can

[1] Sec. 1203, Revised Statutes.

[2] A. R. 996; G. O. 132, War Dept. 1908.

[3] When a reporter is employed, under authority as above, he is paid by the Pay Department on vouchers certified to be correct by the Judge Advocate or recorder, who will forward a copy of the same with the record. He receives $1.00 an hour for time actually spent in court during trial or hearing except when the court sits less than three hours the first day he will receive $3.00 for that day. He is allowed 15 cents for each 100 words for transcribing notes and making that portion of the original record which is typewritten, but no allowance for the first carbon copy of the record which is typewritten or for original papers which are appended as exhibits. An allowance is made of 10 cents for each 100 words for copying papers material to the inquiry, and 2 cents for each 100 words for each carbon copy thereof, when ordered by the court or commission for its use, and 2 cents for each 100 words for the second and each additional carbon copy of the record when authorized by the convening authority. When not provided with government transportation, he receives mileage at the rate authorized for a civilian witness not in government employ, and $3.00 a day for expenses when the Judge-Advocate or recorder keeps him, at his own expense, away from his usual place of employment for 24 hours or more, on public business referred to the court or commission, and the same amount is allowed each necessary assistant, when ordered by the court or commission.

The reporter must furnish the typewritten record and one carbon copy of the proceedings of each session within 24 hours after adjournment of that session, and the complete record finished, indexed, bound, and ready for authentication not later than 48 hours after completion of action of the court or commission on the merits of the case. (A. R. 996, as amended by G. O. 132, War Dept. 1908); Cir. 74, War Dept. 1909.

[4] A. R. 995, G. O. 132, War Dept. 1908.

lawfully receive extra compensation for clerical duties performed for a military court.[1]

**165. Interpreter.**—If an interpreter is also necessary, he may be introduced at this time, and the judge-advocate administers the following oath to him: "You swear that you will truly interpret in the case now in hearing. So help you God." If, however, the services of an interpreter are only needed for a certain part of the trial, as to interpret the testimony of a witness and the like, he may be introduced and take the oath at the time his services are needed.

The necessity for an interpreter is determined by the court, and he is employed by its order.[2] He is allowed the pay and allowance of a civilian witness and is paid by the Pay Department on the certificate of the judge-advocate that he was employed by such order.

[1] A. R. 997. [2] A. R. 998.

## CHAPTER XIII

### CHALLENGES—OATH OF MEMBERS AND JUDGE-ADVOCATE

**166. Challenges.**—The accused being present, his counsel introduced, and other preliminary proceedings completed, the order convening the court is read to the accused, so as to afford him the opportunity to challenge any member thereof. The right to challenge is given by the 88th Article of War, as follows:

Article 88.—Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

The right here given is statutory, does not apply to the summary court, and is limited to but one member at a time "for cause stated." Peremptory challenges, as allowed at common law, are not permitted.

This does not, however, prevent objection to the entire court as being illegally organized and therefore not having legal existence or right to try the case. This objection constitutes a plea to the jurisdiction and at once brings up the question of its power to legally try the case (see Jurisdiction, par. 52 et seq.), and, if sustained, trial of the accused cannot proceed.

**167.** Challenges may be made either orally or in writing. The challenged member may remain silent or he may respond if he wishes; and the admission by him of the

facts stated will cause the court to excuse him, provided those facts constitute a legal ground for objection. If the statement is not satisfactory, the accused may request that the challenged member be placed on his *voir dire*, in which case the judge-advocate administers to him the following oath: "You swear that you will true answers make to questions touching your competency as a member of the court in this case. So help you God." Questions touching his competency may then be put, and the replies thereto are made under the responsibility of his oath, the accused asking such questions as may relate to and test the competency of the member, followed by the questions of the judge-advocate, and by such questions from the court as they may deem pertinent, the record showing the entire proceedings, including the questions, answers, and action of the court. The court in acting upon a challenge always determines, in closed court, the challenged member withdrawing, whether the facts stated constitute a good ground for challenge or constitute legal objection, and, if so, whether they are applicable to the case in question.

**168. Challenges to the Poll.**—Challenges to the poll, or individual challenges, are usually divided into two classes, viz:

*a.* Principal challenges.

*b.* Challenges to the favor.

**169. Principal Challenges.**—A principal challenge is one in which the facts stated, if found correct, constitute a *prima facie* cause for the excuse of the challenged member, such as:

*a.* The fact that the challenged member was a member of a court of inquiry which had investigated the charges, or of a regimental court for doing justice from which appeal in the case on trial has been taken.

*b.* That, under orders from his proper superior, he had

made a personal investigation of the charges and had submitted his opinion thereon.

*c.* That the member challenged was the accuser or prosecutor and a material witness in the case.

*d.* That, it being a rehearing of the case, the challenged member was a member of the court in the former trial.

*e.* That the challenged member stands next for promotion and will gain in rank by the dismissal of the accused. The interest of the member in such case is so great as to justify challenge and excuse by the court; but it is not a sufficient ground of challenge that a member will gain a file by the dismissal.

**170.** In cases of principal challenge, the objection being made, and the facts found as stated, the member should be excused; but, if found as stated, and yet the objection not sustained, while it might not invalidate the proceedings, yet it has been held good ground for disapproval of the proceedings and sentence.[1]

**171. Challenges to the Favor.**—Challenges to the favor include all those in which prejudice, bias, or interest is claimed to exist.[2] The amount of each must be shown by evidence or admitted by the challenged member, who may make such statement, pertinent to the challenge, as he desires, or he may remain silent.

The following are grounds of such objection:

*a.* Previous opinions, formed or expressed. Such opinion must, however, be honestly entertained and be decided, not a transient impression or hypothetical view, or formed on mere rumor, or reading of newspapers, if the member is able to say that he can and will give an impartial decision on the evidence submitted. If, however, it is based on statements of witnesses or reading reports of the testimony in the case this would operate as a disqualification.[3] "If

[1] Davis' Military Law, p. 86.
[2] Ives' Military Law, p. 91; Davis' Military Law, p. 86.
[3] Davis' Military Law, p. 89; Hopt v. Utah, 120 U. S. 430.

not absolutely positive the test which has been applied in civil courts is whether it is so fixed as to require evidence to remove it." [1]

*b.* Personal prejudice or hostility. Every member of the court should have a mind open and free to the reception of testimony, without bias, prejudice or hostility that may influence his judgment on the evidence received. Decided personal animosity from whatever cause, or prejudice or hostility to the accused, sustained by proof of hostile act or of language, constitute a good ground for challenge, as does also the fact that the member preferred the charges in the case, not ministerially under the orders of a superior, but as the actual accuser.[2]

*c.* Being a material witness. The fact that a member of the court is a material witness for the prosecution is cause for challenge but does not, of itself, constitute ground for excuse of the challenged member. The circumstances of each case must determine the validity of the challenge. It is usual, however, and always best when it can be done, to excuse the member if objected to on this ground and the fact is proved or admitted.

*d.* Participation in a former trial in a different case but involving the same question. This is not, of itself, a sufficient ground for excuse, but if the challenged member has formed an opinion from the previous trial as to the guilt or innocence of parties in like cases, he may be excused.

*e.* Intimate personal relations. Where a member of a court is *in fact* likely to be biased by intimate, friendly, social, or other personal relations with the accused, he may, by custom of the service, be objected to by the judge-advocate as justly as he might be by the accused on the ground of hostility.[3]

[1] Winthrop's Abr. Military Law, 3d Ed., p. 84.
[2] Id., p. 85.
[3] Id., p. 86; Court-martial Manual, p. 28.

**172.** After the accused has used his right of challenge the judge-advocate may also, and in like manner, challenge members "for cause stated." It must be noted that these challenges must be made by one or the other of the parties—the accused or the judge-advocate; the court-martial is never authorized to excuse a member at his own request or in the absence of a challenge. A member, not challenged, who thinks himself disqualified, can be relieved only by application to the convening authority.

It is usual for the member, if not previously relieved, to make known the ground for his disqualification so that a challenge may be made by the party and be acted upon by the court.

**173.** The burden of proof to sustain the challenge lies with the party challenging and, to be sustained, the challenge must have a majority vote of the members of the court. If the vote on the question is a tie the challenge is not sustained.

**174. Oath of Members.**—The challenges having been completed and a legal quorum remaining in the case, the members are duly sworn by the judge-advocate, who administers the following oath:

"You, A. B.; C. D., etc., (naming each according to rank from the president to the junior member,) do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the

proper authority, except to the judge-advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law. So help you God." [1]

**Oath of Judge-Advocate.**—The members having been duly sworn, the president of the court then administers the following oath to the judge-advocate: "You, A. B., do swear that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same. So help you God." [2]

**175. Independence of the Court.**—The court-martial in all its proceedings after being organized and duly sworn is independent of the convening authority in hearing and determining the case. "The convening authority is without power to regulate its conduct, or to control or influence its deliberations." [3]

**176. Postponement of Trial, Continuance, etc.**—For any necessary postponement of the trial, before arraignment, application should be made to the convening authority. At or after arraignment, the court may, "for reasonable cause," grant a continuance to either party for such time and as often as may appear to be just; provided that if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.[4]

Upon application by the accused for continuance because of absence of a witness, he must show, on his oath,

[1] Article 84. See post, par. 791.
[2] Article 85. See post, par. 792.
[3] Davis' Military Law, p. 32.
[4] Article 93. See post, par. 800.

that the witness is material, and why, and that he has used due diligence to secure his attendance, and has reasonable ground to believe, and does believe, that he will be able to procure his attendance within a reasonable time stated.

Application for any extended delay will, when practicable, be made to the convening authority. If made to the court and if, in its opinion, it be well founded, it will be referred to the convening authority to decide whether the court shall be adjourned or dissolved.[1]

[1] Court-martial Manual, pp. 31, 32.

## CHAPTER XIV

### ARRAIGNMENT—PLEAS

**177.** The challenges having been disposed of and a quorum remaining, the accused is then arraigned. The arraignment consists in the judge-advocate's reading to the accused, both standing, the charges and specifications on which he is to be tried and receiving his plea thereto.

A plea is a formal answer made by the accused to the charge against him. Pleas may be divided into:

I. Pleas to the jurisdiction.
II. Pleas in abatement.
III. Pleas in bar of trial.
IV. Pleas to the general issue.

These pleas should be made in the order named.

**178. I. Plea to the Jurisdiction.**—This plea, if sustained, denies the jurisdiction of the court in that case; and if not sustained and trial proceeds, the proceedings of the court-martial, if duly approved, may be reviewed by the civil courts, and if the decision is against the jurisdiction of the court-martial its judgment will be set aside.

**179.** Pleas to the jurisdiction involve questions of the legal authority of the court; such as:

*a.* That it was convened by an officer having no legal authority to convene it.[1]

*b.* That its composition is illegal, being composed wholly

[1] Articles 72 and 73. See ante, par. 34 and 41.

or in part of members not authorized by law to sit upon such court-martial.[1]

*c.* That the accused is not subject to its jurisdiction.[2]

*d.* That the offense is not against military law and not, therefore, subject to trial by court-martial.[3]

The sustaining of any one of these pleas made at this time to the jurisdiction inevitably stops proceedings in the case; and, if not sustained, and afterward facts which justify the plea are found, in a review of the proceedings by a civil court, to exist, it will cause the judgment and sentence of the court to be set aside as illegal and void, even if the accused waives the question of jurisdiction. Waiver of objection will never avail to confer jurisdiction upon a court not legally possessing it.

**180. II. Pleas in Abatement** (also called Dilatory Pleas). —A plea in abatement is based upon some defect in the indictment, or charge, and is one that goes to abate the plaintiff's action, that is, to suspend or put it off for the present, but not finally.[4] It is a rule, upon all pleas in abatement, that he who takes advantage of a flaw must, at the same time, show how it may be amended.[5] This plea defeats the action, if sustained, for the time being, but the right of the action itself is not gone and the plaintiff may proceed with it after the defect is removed, or may re-commence it.[6]

**181.** Such pleas, therefore, serve only to delay the trial until the correction may be made, and for that reason are also called "dilatory" pleas. They may be made where there is a misnomer, the accused being charged under a wrong name, or described by a false or improper addition

[1] See Composition of Courts-martial, ante, Chapter V.
[2] See Jurisdiction, ante, par. 52 et seq.
[3] Id.
[4] Bishop, Cr. Proc., Vol. 1, Sec. 738–740; 3 Blackstone's Comm., p. 301.
[5] 4 Blackstone's Comm., p. 335.
[6] Stephen on Pleading, 49.

thereto.[1] In such case the accused is bound to state his proper name, and to point out the correct changes to be made. But where the plea covers simple matter like a change in the middle name or initial letter, the court may order the change made and proceed with the trial without delay in the proceedings.[2]

**182.** If the accused makes no objection to the name or designation under which he is charged and pleads guilty, or not guilty, to a specification in which he is incorrectly named or described, such plea will be regarded as an admission by the accused of his identity with the person designated, and he cannot thereafter object to the pleading on account of misnomer or misdescription, but he may be tried and punished, even though they be erroneous;[3] and a failure, at the arraignment, to take notice of a variance between the form of the specification to which the accused is called upon to plead and such specification as it appeared in the copy of the charges served at his arrest, is a waiver of the objection, and the same cannot be taken advantage of at a subsequent stage of the proceedings.[4]

**183.** Where the accused has not been furnished with a copy of the charges preferred against him, or where the copy furnished is materially different from the one upon which he is arraigned, a continuance may justly be asked for under the provisions of the 93d Article of War.

Where there is a material difference between the copy of the charges and specifications furnished the accused and that upon which he is arraigned, he may take advantage of it by a plea in abatement.[5]

**184.** There is no special form for making the plea; it

[1] Bishop, Cr. Proc., Vol. 1, Sec. 739, 740; 4 Blackstone's Comm., p. 335.
[2] Davis' Military Law, p. 108.
[3] Ives' Military Law, p. 102; Davis' Military Law, p. 110; Dig. Op. J. A. G. 1995.
[4] Dig. Op. J. A. G. 732.
[5] Davis' Military Law, p. 108.

may be written or oral. The burden of proof of sustaining it lies with the accused, and he may introduce evidence, as well as argument, to support it. The prosecution may bring rebutting evidence and is entitled to a reply, all of which is entered on the record.[1]

**185. III. Pleas in Bar of Trial.**—A plea in bar of trial, if sustained, is a substantial and conclusive answer to the action begun, and the accused must be discharged from trial.

Such pleas may be made on the ground of:

1st. The Statute of Limitations.

2d. A former acquittal or conviction.

3d. Pardon.

**186. 1st. The Statute of Limitations.**—This statute affecting persons under military jurisdiction is contained in the 103d Article of War, as follows:

Article 103.—No person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period. (Original Article 103.)

No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was mustered into the service. (Amendment added to original Article 103. Act April 11, 1890.)[2]

[1] Benét, 6th Ed., p. 123.

[2] See post, par. 810.

**187.** The provisions of this article, while applicable to other offenses against military law, do not extend to the offense of desertion "in time of war,"[1] and cannot, therefore, be successfully pleaded in that case. And the judgment of a legally organized court-martial convicting and sentencing a soldier for desertion, duly approved and confirmed by the proper reviewing authority, is not subject to review by a civil court, in *habeas corpus* proceedings, on the ground that the prosecution is barred by limitation under this article, such defense being one to the merits, to be determined by the court-martial, and not affecting the jurisdiction.[2] The plea is a matter of defense. If the plea is not made, or is expressly waived, the trial may proceed. A statute of limitations cannot be taken advantage of by demurrer.[3]

**188. The General Statute.**—The first part of the article quoted above constitutes the general statute of limitations in force at the time of, and prior to, the adoption of the latter part by the Act of April 11, 1890, which refers only to "desertion in time of peace" and not in the face of the enemy.

The general statute, though modified by the additional provision as to "desertion in time of peace and not in the face of an enemy," still applies to offenses under military law except "desertion in time of war." Its period of limitation begins to run from the date of the commission of the offense and runs for two years thereafter. The offense must have been committed within "two years before the issuing of the order for trial, unless, by reason of having absented himself, or of some other manifest impediment," the accused has not been amenable to justice within that period; and it has been held that "the order

[1] Cir. 18, War Dept., 1905; Cir. 29, War Dept., 1906; Ex parte Townsend, 133 Fed. Rep. 76; Cir. 25, War Dept., 1907.

[2] See Ex parte Townsend, 133 Fed. Rep. 74; In re Zimmerman, 30 Fed. Rep. 176; In re Davison, 21 Fed. Rep. 618; In re White, 17 Fed. Rep. 723.

[3] U. S. v. Cook, 17 Wall. (84 U. S.) 168; Op., J. A. G., Dec. 27, 1906.

for trial" within the meaning of this Article is the "reference of the charges to the court for trial," and not the order appointing the court.[1]

**189.** The "absence" referred to in the general clause of the article is not necessarily an absence from the United States but an absence by reason of "fleeing from justice" analogous to that specified in Sec. 1045, Revised Statutes, which has been held to mean leaving one's home, residence, or known place of abode within the district, or concealing one's self therein, with intent to avoid detection or punishment for the offense against the United States.[2] In a case other than desertion, it is not essential for the prosecution to be prepared to prove that the accused had been beyond the territorial jurisdiction of the United States in order to save the case from the operation of the limitation.[3]

To constitute fleeing from justice it is not necessary that the alleged offender be found in another jurisdiction.[4] But any person who takes himself out of the jurisdiction, with the intention of avoiding being brought to justice, can have no benefit of the limitation. It is sufficient that there is a flight with the intention of avoiding being prosecuted, whether a prosecution has or has not been actually begun.[5]

**190.** The plea of the statute of limitations does not challenge the jurisdiction of the court to hear and determine the matter, but is a plea to the merits of the case, and is a matter to be determined by the court in the exercise of its jurisdiction. The court-martial has final determination of the question and its decision is not reviewable in *habeas corpus* proceedings.[6]

[1] Dig. Op. J. A. G. 314.

[2] U. S. v. O'Brian, 3 Dill. (U. S.) 381; Fed. Stat. Annotated, Vol. 2, p. 360; Gould and Tucker, Notes on Revised Statutes, Vol. 2, p. 114; Streep v. U. S., 160 U. S. 128.

[3] Dig. Op. J. A. G. 321.

[4] Porter v. U. S., 91 Fed. Rep. 494; Streep v. U. S., 160 U. S. 128.

[5] Fed. Stat. Annotated, Vol. 2, p. 360; Streep v. U. S., 160 U. S. 128.

[6] Ex parte Townsend, 133 Fed. Rep. 74; In re Zimmerman, 30 Fed.

**191.** The limitation does not apply to courts of inquiry,[1] nor to inferior courts, nor to the hearing of complaints by regimental courts under the 30th Article of War.[2]

**192.** By a plea of guilty the accused is assumed to waive the right to plead the limitation by a special plea in bar. But under a plea of not guilty, the limitation may be taken advantage of by evidence showing that it has taken effect.[3]

**193.** In case of desertion in time of peace and not in the face of an enemy the statute begins to run from the expiration of the term for which the person was mustered into the service, and the arraignment of the accused for the offense must occur within two years from such date, unless he has meanwhile absented himself from the United States, in which case the period of such absence must be deducted.[4]

**194. 2d. A Former Acquittal or Conviction.**—The Constitution of the United States, Article V, provides that no person shall "be subject, for the same offense, to be twice put in jeopardy of life or limb," and this guarantee is applied to persons subject to military jurisdiction by the terms of the 102d Article of War, which are as follows:

Article 102.—No person shall be tried a second time for the same offense.[5]

"Tried," as here used, means duly prosecuted before a legally organized and competent court-martial to *final conviction or acquittal.*[6] Nothing short of "con-

Rep. 176; In re Davison, 21 Fed. Rep. 618; In re White, 17 Fed. Rep. 723; U. S. v. Cook, 84 U. S. 168.

[1] 6 Op. Attorney-General 239.

[2] Davis' Military Law, p. 536.

[3] Dig. Op. J. A. G. 320.

[4] See Tabular Statement, next page.

[5] See post, par. 809.

[6] U. S. v. Perez, 9 Wheat. (22 U. S.) 579; U. S. v. Haskell, 4 Wash. C. C. 409; Dig. Op. J. A. G. 303.

viction" or "acquittal" will justify acceptance of the plea.

**195.** The terms of this article, and the right to the plea under it, apply only to conviction or acquittal by military courts, and not to acquittal or conviction by civil courts.

STATUTES OF LIMITATION: TABULAR STATEMENT

**Statutes of Limitation in Military Law.**

1. **The General Statute (103d A. W.).**
   1. Offenses: Applies to all military offenses triable by military courts, except desertion.
   2. Courts: Applies only to trials before general courts-martial.
   3. Begins to run at the date of the commission of the offense.
   4. Runs two years.
   5. Time excluded: That during which he has absented himself (such as a "fleeing from justice," see Sec. 1045, R. S., and ante, par. 189), or where by other manifest impediment he shall not have been amenable to justice.
   6. A defense: When pleaded and *date of the order convening the court*, that is, the date of the reference of the charges to the court for trial (Dig. Op. J. A. G. 314), is more than two years subsequent to the commission of the offense.

2. **The Special Statute (Act of April 11, 1890, amending 103d A. W.)**
   1. Offenses: Applies only to "desertion in time of peace and not in the face of an enemy."
   2. Courts: Applies only to trials before general courts-martial.
   3. Begins to run at "the end of the term for which said person was mustered into the service."
   4. Runs two years.
   5. Time excluded: That in which he shall "have absented himself from the United States."
   6. A defense: When pleaded, and the *arraignment* under the charges is more than two years after the date when the statute begins to run.

Although there may be two trials resulting from the same act, one before a military court and the other before a civil court, where such courts are acting under authority of different governments, each is for a separate and distinct offense and not for the "same" offense, one being committed in violation of military law and the other of the civil law.[1]

**196.** Where the accused has been once duly convicted or acquitted, he has been "tried" in the sense of this Article and cannot be tried again, against his will; though no action whatever has been taken upon the proceedings by the reviewing authority, or though the proceedings, findings and sentence, if any, be wholly disapproved by him. It is immaterial whether the former conviction or acquittal was approved or disapproved.[2]

**197.** The accused must make the plea; if he waives it the court will proceed with the case, taking no notice of it as a bar to trial.[3]

**198.** When an officer or soldier has been duly acquitted or convicted of a specific offense, he cannot afterward, against his consent, be brought to trial for a minor offense included therein, an acquittal or conviction of which was necessarily involved in the finding upon the original charge. For example, desertion includes absence without leave, and if wholly acquitted, or if convicted of absence without leave only, the accused cannot be again brought to trial for either absence without leave or desertion committed in and by the same act.[4]

**199.** The converse of this is also true; where an accused is tried for a minor included offense he cannot be tried for the major offense, because he would be put in jeopardy a second time for the minor offense (which is included in the major) for which he has already been tried. For ex-

[1] See Carter v. McClaughry, 183 U. S. 395 See Grafton v. U. S., 206 U. S. 333; Cir. 43, War Dept. 1907.
[2] Dig. Op. J. A. G. 307.
[3] Ives, p. 99. [4] Dig. Op. J. A. G. 304.

ample, a soldier tried for "absence without leave" and acquitted or convicted cannot legally be brought to trial for that same absence on a charge of desertion; "absence without leave" being a necessary element of desertion. And where any offense for which an accused has been tried is an essential part of another offense, which might be charged under a different article of war, acquittal or conviction excludes a second trial under the different article.

**200. New Trial.**—It has been held that a new trial on the same charges may be granted for the benefit of the accused at his own request, provided the sentence has not been duly approved and taken effect.[1] After the sentence has been duly approved and taken effect, the granting of a new trial is beyond the power of a military commander or the President.[2]

For error in excluding proper testimony the President may order a new trial by a court composed of different members, upon the motion of the accused. The plea of former conviction or acquittal is the privilege of the accused and may be waived.[3]

New trials have been had only, and are authorized only, when the sentence adjudged on the first trial has been disapproved by the reviewing authority and the accused has asked for a second trial.[4]

**201. 3d. Pardon.**—Pardon is an act of grace which proceeds from the power entrusted with the execution of the laws, and exempts the individual on whom it is bestowed from the punishment which the law inflicts for a crime that he has committed.[5] It becomes operative upon delivery and acceptance, but may be granted to take effect upon some future day.

[1] Davis' Military Law, p. 102.
[2] Dig. Op. J. A. G. 1796.
[3] 1 Op. Attorney-General 233.
[4] Dig. Op. J. A. G. 1796.
[5] U. S. v. Wilson, 7 Peters (32 U. S.) 160.

**202.** A general pardon should be taken judicial notice of by the court, but a special or individual pardon must be brought up by the person pleading it.

**203.** The power to pardon may be exercised at any time after the commission of the offense, either before legal proceedings are taken or while they are pending or after conviction and judgment; and a plea of pardon granted during the trial would be valid.[1] The pardon, in order to be valid, must be granted by one having legal authority to grant it, and it must be produced and submitted to the court. If it is a general pardon to certain classes of offenders, the accused must show that he is included in the classes mentioned in the pardon or amnesty. A constructive pardon is one where an act of the proper military superior indicates a purpose to abandon or desist from the prosecution of a particular offender. It will ordinarily be proved by the testimony of witnesses as to its source and authority, as well as to the extent and terms of the alleged release.[2]

**204. IV. Pleas to the General Issue.**—All special pleas, if any, being disposed of, and the court still retaining jurisdiction of the case, the accused is called upon to plead to the charges and specifications as they stand. This final plea is known as "the plea to the general issue."

This is usually by a plea of "guilty" or "not guilty" to the specifications under each charge and then to the charge itself. The plea may except parts of the specification or certain words, substituting others therefor; but every part of each specification must be covered by the plea. The accused may plead guilty of the specification and not guilty of the charge, but a plea of not guilty of the specification and guilty of the charge would be inadmissible, for the truth of the specification is necessary to sustain the charge.

[1] Ex parte Garland, 4 Wall (71 U. S.) 334.
[2] Davis' Military Law, p. 107.

**205.** A plea of "guilty without criminality" is inconsistent, because "guilt" implies criminality. Such a plea is, therefore, practically a plea of "not guilty" and should be so considered by the court, and evidence must be taken to sustain the charge.

The accused making such a plea should be instructed as to the actual effect thereof, and informed that he has the privilege of pleading guilty to parts of the specification and not guilty to other parts, and that after the pleas are disposed of, he may make such admissions as he may deem proper.

**206.** A plea of "guilty" admits the jurisdiction of the court and waives any defect in the form of the charges and specifications; in civil courts no testimony is usually introduced after such a plea, but in military courts it does not necessarily prevent the admission of evidence, in fact it is required, where it is necessary for a proper understanding of the facts and of the degree of criminality of the accused, that it shall be introduced, even if opposed by the accused. But, if introduced, the accused has the right to introduce evidence in rebuttal [1] and to cross-examine witnesses, or to offer evidence as to character; and he may address the court in extenuation of the offense or in mitigation of the punishment.[2]

Where, however, the court is illegally constituted or is without jurisdiction in the case, the question of jurisdiction cannot be waived and jurisdiction thus conferred upon a court not otherwise possessing it.

**207. Change of Plea.**—The court may, in its discretion, permit the accused to withdraw a plea of "not guilty" and substitute a plea of "guilty," or *vice versa*, or to substitute for either of these general pleas a special plea, provided the application therefor is made in good faith

[1] Dig. Op. J. A. G. 994, 1002, 1988, 1993.
[2] Court-martial Manual, p. 33.

and not for the purpose of delay, and that to grant it will not result in unreasonably protracting the investigation.[1]

**208. Statement Inconsistent with the Plea.**—A statement, after a plea of guilty, which contradicts this plea is substantially a withdrawal of the plea. Where an accused, after a plea of guilty, makes a statement inconsistent with the plea, the court will advise the accused to plead not guilty, and may direct such a plea to be entered, and proceed to trial and investigation of the case on its merits, the judge-advocate introducing the proof precisely as under the plea of "not guilty."[2]

**209. Standing Mute.**—The 89th Article of War provides as follows:

Article 89.—When a prisoner, arraigned before a general court-martial, from obstinacy and deliberate design, stands mute or answers foreign to the purpose, the court may proceed to trial and judgment as if the prisoner had pleaded not guilty.

A prisoner may, however, stand mute or answer foreign to the purpose from other causes than obstinacy and deliberate design, as in case of:

*a.* Visitation of God.

*b.* Lack of intellectual capacity to understand the proceedings sufficiently to enable him to make a proper plea or to properly defend himself.

In either of these cases it is the duty of the court to investigate and determine the nature and extent of the disability.[3]

If the investigation shows disability to exist, the court should suspend its labors and report the facts to the convening authority for his instructions in the case.

[1] Davis' Military Law, p. 115.
[2] Dig. Op. J. A. G. 1990.
[3] Davis' Military Law, p. 118; Ives' Military Law, p. 111; Benét, p. 108; Winthrop, Vol. 1, p. 328.

**210. Nolle Prosequi.**—Nolle prosequi is the formal declaration of the prosecuting officer that he will no further prosecute the case, either as a whole or as to some of the counts of the accusation. In the civil courts after a jury has been impanelled a *nolle prosequi* cannot be entered without the consent of the defendant, even with the consent of the judge; if the hearing is stopped by the prosecuting officer withdrawing a juror, the effect is an acquittal and the defendant is entitled to a verdict of not guilty; but if a juror is under some legal incompetency, unknown to either party, when the cause is opened, or becomes incompetent from any cause during the trial, his discharge does not prevent a second trial.[1] In court-martial cases where the court has been duly organized and sworn, the accused arraigned and his plea entered, the court is fully in possession of the case, and the accused is in general entitled to have the trial carried to acquittal or conviction.[2]

**211.** A prosecution before a court-martial proceeds in the name and by authority of the government; the United States, through the Secretary of War, or the military commander who has convened the court, may, therefore, require or authorize the judge-advocate to enter a *nolle prosequi* in a case on trial (or less technically to withdraw or discontinue the prosecution) either as to all the charges where there are several, or as to any particular charge or specification. But the judge-advocate cannot exercise this authority at his own discretion, nor can the court direct it to be exercised.[3] When, however, an *issue* is made as to the sufficiency of the charge or specification, by special plea or objection of the accused, the court may sustain it, and quash or strike out the charge.[4]

[1] Bishop's New Cr. Law, Vol. I, Secs. 1016, 1039.
[2] Davis' Military Law, p. 118.
[3] Dig. Op. J. A. G. 1797.
[4] Court-martial Manual, p. 20.

## CHAPTER XV

### ATTENDANCE OF WITNESSES—WRIT OF ATTACHMENT—HABEAS CORPUS

**212.** The judge-advocate of a court-martial is authorized by law (Sec. 1202, R. S.) to issue like process to compel witnesses to appear and testify, as may lawfully issue from the courts of criminal jurisdiction within the State, Territory, or District where such court-martial shall be ordered to sit. Witnesses for both prosecution and defense are subpœnaed by the judge-advocate, and the accused must, therefore, furnish his list of witnesses to him in time for them to be subpœnaed and appear at the time and place of trial. The judge-advocate will summon only necessary witnesses, and unless he is satisfied that their testimony is necessary and material will not summon any witness at the expense of the government.[1] If he declines to subpœna a witness declared by the accused to be material and necessary for his defense, the question will be submitted to the court and, if it so decides, the witness will be subpœnaed by its order.

**213.** Subpœnas may be served by any person competent to make oath to the service;[2] the service must be

[1] A. R. 957.

[2] Subpœnas should ordinarily be served by persons in the military service, but they may be served by civilians when service by persons in the military service is impracticable or less economical. Where service is made by a civilian, he is entitled to a reasonable compensation therefor, and his accounts will be sent to The Adjutant General of the Army with a view to payment. (Cir. 42, War Dept., 1906.)

personal. Judge-advocates of courts-martial must, whenever it is possible, send their subpœnas through military channels.[1] In the case of military persons the summons [2] sent through proper channels is sufficient to procure attendance. If at the post where the court convenes, it is transmitted through the post commander. If the person summoned is at any other post than that at which the court is sitting, the department commander will be requested to order the witness to attend, or the witness will apply to his proper superior for necessary orders or authority to obey the summons.[3] As he is subject to military authority he is not entitled to fees or mileage other than that provided by law for persons in the service travelling on duty under orders, the order stating that such travel is necessary for the public service.

**214. Civilian Witness.**—In the case of a civilian witness the subpœna must be made out in duplicate [4] and personal service made by delivery to the witness of one of these subpœnas, the other being retained by the person serving the subpœna, who endorses it with his certificate of service, showing the date and place thereof, and his affidavit to the truth of his certificate, made before an officer authorized to administer oaths for general purposes, and returns it to the judge-advocate.

**215.** A civilian witness in the employ of the government duly subpœnaed to appear before a court-martial is entitled to transportation in kind from his place of residence to the place of meeting of the court and return, or, if that is not furnished, to a reimbursement of the cost of travel.[5]

[1] A. R. 958.
[2] See Form, Appendix E, 11.
[3] A. R. 959; Court-martial Manual, p. 38.
[4] See Form, Appendix E, 12.
[5] This reimbursement consists of the cost of travel, by the shortest usually travelled route, including transfers at not more than fifty cents each, and double berth in sleeping-car or steamer, and also cost of

A civilian not in the employ of the government duly summoned to appear before a court-martial is paid by the Pay Department.[1]

**216.** Compensation to civilians, in or out of government employ, for attendance as witnesses at civil courts is payable by the civil authorities.[2]

**217.** The fees of civilian witnesses, and the mileage of witnesses and fees of civil officers taking depositions, are paid by the Pay Department.[3]

**218.** When a civilian witness, duly subpœnaed to appear before a court-martial, refuses to appear or qualify as a

meals and rooms not exceeding $3.00 for each day actually and unavoidably consumed in travel or in attendance upon the court, in cases where the court is sitting at a place which requires them to leave their stations (A. R. 999.)

[1] Such witness will receive $1.50 per day for each day actually in attendance upon the court, or for deposition, and 5 cents per mile for going from his place of residence to the place of trial or deposition, and 5 cents a mile for returning; except in Porto Rico and Cuba, where he will receive 15 cents per mile for travel over any stage line, or by private conveyance, and 10 cents per mile over any railway or steamboat line; in Alaska, east of the 141° of west longitude, he will receive $2.00 per day while in attendance and 10 cents per mile, and west of said degree $4.00 per day and 15 cents per mile.

In Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, Utah, New Mexico, and Arizona he will receive $3.00 a day including the time necessarily occupied in going and returning; 15 cents per mile for travel by stage line or private conveyance, and 5 cents per mile by any railway or steamship line. (A. R. 1000; G. O. 128, War Dept. 1908.)

[2] A. R. 1004.

[3] The charges for return journeys of witnesses are based upon those allowed for travel to the court, and the whole amount due a witness is paid him upon his discharge from attendance without waiting for completion of the return journey. (A. R. 1002.)

The items of expenditure authorized are set forth in detail as part of the voucher for reimbursement, and their correctness attested by the affidavit of the witness, made, when practicable, before the judge-advocate. The certificate of the judge-advocate will be evidence of the fact and period of attendance of the witness, and this must be made upon the voucher. (A. R. 1003.) The voucher must also be accompanied by the original summons or a certified copy thereof. If there is no paymaster present at the place where the court sits, the account thus prepared and authenticated may be transmitted to the proper paymaster for payment. In important cases, the judge advocate will also confer with him as to measures to be taken to the prevent fraud in payment thereof. (Cir. 74, War Dept. 1909). Blank accounts for civilian witnesses may be secured from the Paymaster-General or any army paymaster.

witness, or to testify or to produce documentary evidence, as required by law, he will at once be tendered or paid by the nearest paymaster one day's fee and mileage for the journeys to and from the court, and will thereupon be again called upon to comply with the requirements of the law.[1] But the fees and mileage of a civilian witness residing outside the State, Territory, or District where the court is held will not be paid in advance, as such witness cannot be punished for refusal to obey the summons.[2]

**219.** An officer charged with serving a subpœna may pay fees and mileage to a witness upon whom he serves it, taking a receipt therefor, and be reimbursed the amount of the payment.[3]

**220.** Where a witness resides outside the State, Territory, or District in which the court-martial sits, he may be subpœnaed, but cannot be compelled to attend; nor can he be punished for neglect or refusal to appear and qualify or testify under the provisions of the Act of March 2, 1902. But if he is subpœnaed and does attend, he will be paid his fees and mileage as provided for other witnesses. In cases where he does not attend his evidence may be taken by deposition.[4] But the attendance of a witness residing "within the State, Territory, or District" may be secured through the warrant of attachment issued by the judge-advocate.

**221. Writ of Attachment.**—When a witness residing within the State, Territory, or District in which the court sits, who has been duly subpœnaed and tendered his mileage and at least one day's fees, neglects or refuses to appear before the court, the judge-advocate may issue like process to compel such witness to appear and testify, which courts of criminal jurisdiction within the State, Territory, or District where the court sits, may lawfully issue.[5]

[1] A. R. 1001. For provision for the punishment of a witness who refuses to comply with the requirements of the law, see ante, par. 72.
[2] A. R. 1001.
[3] Cir. 38, H. Q. A. 1901.
[4] See Deposition, par. 251, post, et seq.
[5] Sec. 1202, Revised Statutes. This process is the writ or warrant of attachment, and through it the witness may be brought before

**222.** When this process is issued to compel the attendance as witnesses of persons not in the military service, but residing in the State, Territory, or District in which the court sits, the judge-advocate will formally direct the same to an officer designated by the department commander to execute it, and the nearest military commander will furnish the necessary military force for the execution of the process, if force be required.[1] The officer designated to execute the process should also be furnished with the order convening the court, or a certified copy thereof, and with the original subpœna with the affidavit of service thereon. This subpœna is returned when the attachment is executed.

**223. In the Philippine Islands.**—"Every person not belonging to the Army of the United States, who, in the Philippine Islands, being duly subpœnaed to appear therein as a witness before a general court-martial of said Army, wilfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be punished by a fine of not more than five hundred dollars, United States currency, or imprisonment not to exceed six months, or both, at

the court-martial, such force only being used as may be necessary to bring him. The writ is headed by the name of the case, "United States v. ——," is directed to the person who is to serve it by the words "The President of the United States to ———, Greeting," and states that, whereas the witness (naming him) has been duly subpœnaed to appear before a general court-martial convened by orders from legal authority to convene such court (giving the number and date of the order and the headquarters from which issued) on behalf of one of the parties in the case (stating which one) and that he has failed to appear and attend to testify as required by said subpœna, before said general court-martial, and that he is a necessary and material witness in the case, therefore, the judge-advocate by virtue of the power vested in him by Section 1202, Revised Statutes of the United States, commands and empowers said person named in the warrant to apprehend and attach said witness (naming him) wherever he may be found, and to bring him before the court to testify as required by said subpœna. The judge-advocate dates and signs the writ as judge-advocate of the court-martial. (See Form, Appendix E, 16.)

[1] A. R. 960.

the discretion of the court, and it shall be the duty of the proper fiscal or prosecuting officer, on the certification of the facts to him by the general court-martial, to file in the proper court a complaint against and prosecute the person so offending: *Provided*, That one dollar and fifty cents, United States currency, for each day's attendance, and five cents, United States currency, per mile for going from his place of residence to the place of trial or hearing and five cents per mile for returning, shall be duly tendered to said witness: *Provided further*, That no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate him."[1]

**224.** Employees of the civil government of the Philippine Islands, paid from insular funds of the islands, are held not to be in the employ of the United States.[2]

HABEAS CORPUS

**225. Return to Writ of Habeas Corpus for Witness Held.**—An officer holding a civilian witness under a warrant of attachment which he has been ordered to execute may be served with a writ of *habeas corpus* from a civil court alleging illegal restraint of said witness and directing him to appear and produce the body of the witness before that court.

**226.** If the writ issues from a United States court or judge, it should be promptly obeyed, and the officer must present himself with the person he is holding before the court, and there make return to the writ, stating the authority under which he holds the witness, and his reasons for so holding him, at the same time exhibiting his warrant of attachment and the documents furnished therewith.

[1] Court-martial Manual, p. 38, 39; Act Philippine Commission (No. 1130), 1904; Cir. 45, A. G. O., 1902.

[2] Court-martial Manual, p. 38; Cir. 45, A. G. O., 1902; see Appendix E, 23.

**227.** If the writ of *habeas corpus* is issued by a State court[1] or judge for a civilian held by an army officer under writ of attachment, the officer will not produce the body of the witness held to be illegally restrained, but will make a respectful return to the writ, setting forth fully the authority by which he holds the person and allege that State authority is without jurisdiction to issue the writ of *habeas corpus*, and ask to have the writ dismissed. He will also exhibit to the court or officer issuing the writ of *habeas corpus*, the warrant of attachment and the subpœna, with proof of service thereof, on which the warrant of attachment was based, and also a certified copy of the order convening the court-martial before which he had been commanded to take the person.[2]

**228. Habeas Corpus for Enlisted Men or Military Convicts.**—If the writ of *habeas corpus* issued by a United States court or judge be served upon an officer requiring him to produce the body of an enlisted man or military convict before such court or judge, it must be promptly obeyed, and the officer must appear before the court, with the person named, at the time and place indicated in the writ, and make return thereto by stating the fact of enlistment, or the authority by which the military convict is held, setting forth fully therein the reasons for his restraint. He reports the fact of such service by telegraph direct to The Adjutant General of the Army and the commanding general of the department.[3]

Should the court order the discharge of the party, the officer making the return, or his counsel, should give notice of an appeal pending instructions from the War Department, and he will report to The Adjutant General of the Army the action taken by the court and

[1] See Appendix E, 24.
[2] A. R. 1007.
[3] A. R. 1009.

forward a copy of the opinion of the court as soon as it can be obtained.[1]

**229.** If the writ issue from a State court or judge, the officer must decline to produce in court the body of the person named in the writ, but will make a respectful return in writing stating that the person held is a duly enlisted soldier in the service of the United States, or a military convict under sentence of court-martial, as the case may be, and is, therefore, held under color of authority of the United States, and that the Supreme Court of the United States has decided that a magistrate or court of a State has no jurisdiction in such a case.[2]

A minor who unlawfully enlists without the consent of his parent or guardian "changes his status," becomes a soldier, and cannot be discharged from the service on a writ of *habeas corpus* sued out by such parent or guardian, so long as he is under arrest and being held on any charge cognizable by a military court, nor until he has been discharged from such custody, or has served the sentence imposed on him by the military tribunal.[3]

IN THE PHILIPPINES

**230.** No writ of *habeas corpus* shall be issued against a military officer or soldier who is detaining a prisoner in any unorganized province or territory of the Philippine Islands.

It shall be a conclusive answer to a writ of *habeas corpus* against a military officer or soldier, and a sufficient

[1] G. O. 127, H. Q. A., A. G. O., 1900.

[2] A. R. 1008.

[3] In re Scott, 144 Fed. Rep. 79; U. S. v. Reaves, 126 Fed. Rep. 127; In re Morrissey, 137 U. S. 157; In re Lewkowitz, U. S. Cir. Ct. Southern Dist. N. Y., Aug. 14, 1908; Dillingham v. Booker, 163 Fed. Rep. 696.

For forms and instructions as to returns to writs of *habeas corpus* and as to authorities, see Appendix E, 23–26, and G. O. 127, H. Q. A., A. G. O., October 8, 1900; post, Chapter XXXI, Article 3, par. 710, "Minors."

excuse for not producing the prisoner in all organized provinces of the Philippine Islands, if the commanding general or any general officer in command of the department or district shall certify that the prisoner is held by him either:

*a.* As a prisoner of war;

*b.* As a member of the Army, a civilian employee thereof, or a camp-follower and subject to its discipline; but this paragraph shall not apply to pending cases (October 1, 1901); or

*c.* As a prisoner committed by a military court or commission prior to October 1, 1901; or

*d.* As a prisoner arrested and held for trial before a military court or commission before October 15, 1901, for a violation of the laws of war committed before the same date; or

*e.* As a prisoner guilty of violations of the laws of war committed in an unpacified province or territory, and who has escaped into provinces officially declared to be under civil control and has been captured by military authorities and is held for trial for such violations of the laws of war.

**231.** Respectful return in writing will be made in the case of prisoners who may be exempted from jurisdiction by the provisions of the acts above cited, stating the facts of the case, but the body of the prisoner will not be produced. In all other cases the return will be made and the body produced before the proper tribunal.[1]

[1] Court-martial Manual, p. 73; Acts of Philippine Commission, October 1, 1901, and June 23, 1902.

## CHAPTER XVI

### INTRODUCTION OF EVIDENCE—DEPOSITIONS

**232. Introduction of Evidence.**—All other pleas having been disposed of and the plea of "not guilty" having been entered to all or any part of the charges and specifications, the judge-advocate prepares to introduce the witnesses for the prosecution. He may, if he desires, precede their introduction by a statement of the case, restricted to the facts contained in the charges, and his proposed plan of introduction of the evidence, but not using this privilege to prejudice the court against the accused; and this statement should appear in full on the record. This method of opening the case is, however, seldom used except in the most important cases before military courts.

**233.** During the examination of a witness all other witnesses are, as a rule, excluded from the room, but the fact that a witness is called who has heard all or part of the evidence does not render him incompetent to testify, although it may affect his credibility. In case of a prosecuting witness, who is also the accuser, he should be first examined and then may remain and, as accuser, assist the judge-advocate in conducting the prosecution. The judge-advocate or any member of the court may testify for either side if called, without affecting the validity of the proceedings.[1] When the judge-advocate is called

[1] Dig. Op. J. A. G. 1667.

upon to testify the oath, taken by all witnesses (Article 92), is administered to him by the president of the court.

**234. Experts.**—A witness who is an "expert" and whose testimony, being in the nature of an opinion, is or may be based upon that of other witnesses, may be permitted to hear their evidence.[1] When occasion arises for the employment of an expert witness in a trial before a general court-martial, the necessity for such employment should be made to appear by a resolution of the court, and the request for authority to employ, showing the cost of the services, will be submitted to the Secretary of War for approval in advance of the employment.[2]

**235. Credibility of Witnesses.**—The credibility of a witness is his worthiness of belief, and this is determined, in civil cases, by the jury from his manner of giving testimony; his interest in the case, if any; by comparison of his testimony with that of others; and then giving proper weight to his evidence.

Courts-martial, legally exercising the functions which are performed separately by the judge and jury in civil cases, determine questions of both competency and credibility.

**236. Competency of Witnesses.**—The competency of a witness is his legal ability to testify, and being a question of law is determined, in any particular case, in civil courts by the judge; in courts-martial by the court itself. Any objection to the competency of a witness should be made before he is sworn and the question determined by the court before he is permitted to testify. The objection to the competency of a witness should be made before examination, if known, but it may be made in the course of the examination if only then discovered, and provided it is made as soon as it becomes apparent; it cannot be made

[1] Davis' Military Law, p. 120.
[2] Cir. 30, War Department, 1904.

after the witness has left the stand.[1] There are several grounds of incompetency at common law which justify objection, such as want of understanding, want of religious belief, infamy, etc.[2]

**237.** The incompetency of the witness may be established by the testimony of other witnesses, or by putting him on his *voir dire*. In putting him on his *voir dire* the party doing so accepts him as a credible witness and the general rule of the authorities is that where the objecting party has done this he cannot afterward resort to the other method; though it would not preclude resort to the other mode to prove incompetency on another ground.[3] This oath, administered by the judge-advocate, is as follows: "You swear that you will true answers make to questions touching your competency as a witness in this case. So help you God."

The questions as to his competency asked by the party controverting it, those of the judge-advocate and of the court, if any, being answered, the court determines therefrom the competency or incompetency of the witness. The entire proceedings, including the questions and answers and decisions of the court, should appear in full in the record.

**238. Examination of Witnesses.**—Courts-martial follow the common law rules of evidence as applied by U. S. courts in the trial of criminal cases,[4] but they are not strictly bound thereby and may permit the introduction of evidence necessary to show the entire facts in the case, subject to the law providing that no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him.[5] There being no

[1] Am. and Eng. Encyc. of Law, 2d Ed., Vol. 30, p. 970.
[2] See Evidence, post, par. 547 et seq.
[3] Davis' Military Law, p. 261.
[4] See post, par. 549.
[5] Act March 2, 1901.

objection to the witness, or, if objected to, his competency being sustained by the court, the judge-advocate administers to him the following prescribed oath: "You swear (or affirm) that the evidence you shall give, in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God." [1] The attestation, or act which makes the oath binding, may be in any form declared by the witness to be binding on his conscience.[2]

**239.** During the administration of the oath the judge-advocate and the witness stand, both uncovered, the latter raising his ungloved right hand during it and signifying his assent at the close by the words, "I do " or "I do, so help me God," or, if he remains silent, his assent is understood. His name, rank, and regiment or corps, are then entered on the record, and he is first asked whether he knows the accused, or some question which will identify the latter in connection with the charges in the case. The questions of the judge-advocate then follow in an orderly and methodical series intended to develop all the facts and circumstances connected with the case in a clear and connected manner so far as the witness has knowledge of them.

**240.** These questions and answers are fully recorded and so far as possible the exact words of the answers to the questions are entered, in order that the court and the reviewing authority may understand the precise idea intended to be conveyed by the witness. Every member of the court should, if it is possible, hear the testimony that he may understand the full weight of the evidence as it appears from the words and manner of each witness.

**241. Cross-examination.**—The direct examination, by the judge-advocate, being completed, he so announces and

[1] Article 92.
[2] See post, par. 615.

the accused is then entitled to cross-examine the witness, after which there may be a re-direct examination, and a cross-examination upon any new point brought out therein.[1]

**242. Examination by the Court.**—Upon conclusion of the examination of a witness by the parties to the case the court may, when necessary, ask questions to clear up doubtful points or to make plainer the evidence given, although it, or any member, with its assent, may ask a question for this purpose at any time. This being concluded and there being no further questions asked him, the witness is thereupon excused; but he may be recalled by either party for further examination or cross-examination upon an application to the court to this effect being granted; or the court itself may direct him recalled.

A witness recalled is not again sworn in the same case, but it is usual to warn him that he is still under oath as administered to him in the beginning.

**243. Objections.**—Objections may be made by either party to any question asked, or to the admission of oral or written evidence on the ground that it is irrelevant, immaterial, improper, and inadmissible under the rules of evidence, being secondary evidence, hearsay, etc.[1]

**244.** A question asked by a member of the court and objected to will be recorded as "question by member" if the objection is sustained; if not sustained it becomes a "question by the court." The decision of the court as to whether a question shall be asked or not, or as to the inadmissibility of evidence, is final.

**245.** In making the objection the grounds upon which it is based must be stated; a simple statement of objection without giving the reason for it will not be sustained.

If the question is not an important one, when objection is made, the court may determine it at once; but if there

[1] See Evidence, Chapter XXIX, post, par. 547 et seq.

is to be discussion concerning it, the court should be cleared, and its determination announced upon re-opening.

**246.** Both the judge-advocate and the accused may, after their examination has closed, submit a question to the court, and upon its assent to being put it is entered upon the record as a "question by the court."

**247.** If no stenographer is present all questions are written out in full and handed to the judge-advocate, who puts them to the witness and records the answers; if there is a stenographer for the court the examination may be conducted orally as in civil courts.

**248. A Leading Question** is one which embodies a material fact which may be answered by "Yes" or "No"; or one which assumes a fact which is in controversy, so that the answer thereto may really or apparently admit that fact; or, in general, one which suggests the answer to the witness. Such questions are not permitted except during cross-examination, or in case of a reluctant witness, or to refresh memory, etc.[1]

**249. Reading Over the Testimony.**—After all the testimony of a witness has been received and his examination has been completed it may be read over to him, if he desires to hear it, for purpose of correction or explanation of any point not clear; all such explanations should be entered in the record without expunging the original testimony. He is then permitted to retire.

The judge-advocate then calls his next witness, and the trial proceeds with his examination as before. When his last witness has testified, and when the judge-advocate has produced all his evidence, he announces that "the prosecution here rests," and this is entered upon the record.

**250. Sick or Absent Witnesses.**—Where a witness is sick and cannot attend, or is absent, the court may ad-

[1] See Wigmore on Evidence, Vol. 1, Sec. 770, 771.

journ to such time as may be necessary to secure his attendance if he is a material witness. Should he be sick at the post, and the surgeon think him capable of testifying, the court may adjourn to his quarters and receive his testimony, the accused, his counsel and the judge-advocate being present with the usual right of examination and cross-examination. Where a witness resides outside the limits of the State, Territory, or District in which the court sits, his evidence may be obtained by deposition.

### DEPOSITIONS

**251.** "The depositions of witnesses residing outside the limits of the State, Territory, or District in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital." [1]

**252.** A capital case is one punishable by death; in all cases, therefore, not so punishable, depositions may be taken under the above article. With the consent of both parties the deposition of a person residing *within* the State, Territory, or District in which the court sits may be taken and read in evidence; in such case a written stipulation as to the admission of the deposition, signed by both parties, should be attached to the deposition before the answers of the witnesses are taken. In capital cases, or in cases where the judge-advocate can certify "that the interests of justice demand that the witness shall testify in the presence of the court," the regular subpœnas will be made out by the judge-advocate, certified to as above, if necessary, and transmitted to the commander of the department where the court is convened, with a request that they be duly served on the witness, if a civilian. If the witness is in the military service the department

[1] Article 91. See Chapter XXXI, post, par. 798.

commander will be requested to order him, or cause him to be ordered, to attend before the court.[1]

**253.** The deposition may also, by agreement, be taken before the meeting of the court, the interrogatories and cross-interrogatories being, in such case, signed by the judge-advocate and the accused *instead of the president and judge-advocate:*[2] or they may be taken "on reasonable notice to the other party," in which case they will be subject to exceptions when read in the court.

**254.** The usual method of preparing the deposition is for the party desiring the evidence to prepare his list of interrogatories and submit them to the other party, who then prepares his cross-interrogatories; to these other interrogatories and cross-interrogatories may be added, if desired, and the whole is then submitted to the court, which may add such interrogatories as it deems necessary or proper; neither party can object when the court acts thereon, its decision in the matter being final. The interrogatories having been accepted by the court, the judge-advocate, if the witness is a civilian, forwards them with duplicate subpœnas as in the case of other witnesses, to the commander of the department within the territorial limits of which the witness resides, with request that the deposition be secured.[3] He does not, however, insert the time when, or the place where, the witness is to appear before the officer who is to take the deposition; these being filled in by the officer himself before the subpœna is served.

Where the name of the officer who is to take the deposition is not known in advance it will be filled in by the department commander, to whom the interrogatories are forwarded with the request that the deposition be taken, and who upon receipt thereof designates an officer for this purpose.

**255.** If the deposition of a military witness is required, subpœnas will not be enclosed with the interrogatories,

[1] Court-martial Manual, p. 42; G. O. 5, War Dept. 1908.
[2] Id. p. 40; Id. p. 173, note.
[3] In case of an officer or enlisted man serving outside the jurisdiction of a department commander these papers will be forwarded to The Adjutant-General of the Army.

but the officer before whom the deposition is to be taken, or the officer who causes it to be taken, will direct the witness to appear at the proper time and place.[1]

**256.** The oath may be administered to the witness by the judge-advocate of a department, or of a court-martial, or by the trial officer of a summary court.[2] Where none of these officials are available the oath should be taken before a notary public or other civil officer having authority to administer oaths for general purposes.

**257.** The deposition when completed is certified to by the officer designated to secure it, as duly made and taken under oath,[3] and is by him forwarded in a sealed package direct to the president of the court-martial. When received the entire deposition must be submitted in evidence; neither party has a right to withhold any part of it, but it must be received in its entirety. It is attached to the record, with a suitable reference mark in the body of the record, containing a statement of the fact, and of all actions taken with reference to it.[4]

**258.** The witness making deposition is entitled to fees and mileage to the place of attendance and return, as in case of other witnesses. Upon receipt of the deposition it is the duty of the judge-advocate to certify the account, stating the fact of attendance and period thereof, and to mail the accounts, with duplicate copies of the order convening the court, to the witness, who receives payment thereof from any army paymaster.[5]

Persons before whom depositions of civilian witnesses are taken for use before courts-martial will be paid the

[1] Court-martial Manual, p. 40.

[2] Act July 27,1892.

[3] This officer may be an army officer, or a notary public, or other civil officer empowered to administer oaths for general purposes (G. O. 227, War Dept. 1909). For form, see Appendix E, 17. These requirements having been complied with, the deposition will have been "duly authenticated" as prescribed by the law.

[4] In foreign countries the only mode in which depositions can be taken is under a commission, duly authorized therefor. (Stein v. Bowman, 13 Pet. (38 U. S.) 209.)

[5] See Forms, Appendix E, 18–20.

fees allowed by the law of the place where the depositions are taken.[1]

**259.** The deposition duly taken, under the 91st Article of War, on the part of the prosecution is not subject to objection by the accused, and cannot be rejected by the court merely upon the ground that under the VIth Amendment to the Constitution "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." This constitutional provision has no reference to courts-martial; the "criminal prosecutions" referred to are prosecutions in the United States civil courts.[2]

Affidavits taken *ex parte* and not as depositions under the 91st Article of War are in no case admissible as evidence unless expressly consented to by the accused with full knowledge of his rights.[3]

**260. Witnesses for the Defense.**—Before introducing his witnesses for the defense the accused may desire time to prepare for it, and a reasonable delay is usually granted if it is requested for that purpose, not more than a few hours, or a day, being necessary if the witnesses are at hand. He may also precede the examination of witnesses by a statement of the case as he expects to prove it; but usually statements are deferred until the close of the trial.

**261.** His witnesses when introduced are sworn by the judge-advocate, who also asks their names that they may be correctly entered upon the record. Each witness is then examined by the accused, and cross-examined by the judge-advocate, questioned by the court, etc., the method of procedure being similar to that in case of a witness for the prosecution.

**262.** Finally the accused may ask to testify in his own behalf, and if he does so, the fact must be entered on the

[1] Court-martial Manual, p. 41; Cir. 12, A. G. O., 1901; for schedule of fees authorized, see Cir. 66, War Dept. 1907.
[2] Dig. Op. J. A. G. 272; Id. 1019.
[3] Court-martial Manual, p. 46.

record that "the accused was then, at his own request," duly sworn as a witness "in his own defense," for the statute provides that at his own request, but not otherwise, he shall be a competent witness and that "his failure to make such request shall not create any presumption against him." [1]

**263.** If he does appear as a witness on his own behalf he is subject to cross-examination as any other witness, and to the rules governing the admission of evidence. Having voluntarily offered himself as a witness, he thereby becomes bound to submit to a proper cross-examination under the law and practice in the jurisdiction where he is being tried; [2] and is subject to impeachment like other witnesses.[3]

**264.** A greater latitude is allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses. Still when the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion, and the exercise of that discretion is not reviewable by the civil courts on a writ of error.[4]

The accused, as he is not required to testify and need not go on the stand at all, must, if he take the stand, testify to all facts relevant to the case, and, in the absence of statutes restricting the cross-examination, he may be questioned as any general witness in the case.[5] He may be cross-examined on the whole case, and not simply on what relates to his examination-in-chief.[6]

When the defendant becomes a witness he is made

[1] Act March 16, 1878, 20 United States Statutes at Large, p. 30.
[2] Spies v. Illinois, 123 U. S. 180.
[3] Fitzpatrick v. U. S., 178 U. S. 316; Wigmore on Ev., Sec. 890.
[4] Rea v. Missouri, 17 Wall. (84 U. S.) 542; Davis v. Coblens, 174 U. S. 719.
[5] Op. J. A. G., May 15, 1905. See Fitzpatrick v. U. S., 178 U. S. 315; Sawyer v. U S. 202, U S. 150.
[6] Wharton, Law of Ev., Vol. 1, Sec. 481; Winthrop., Vol. 1, p. 507; Jones on Evidence, par. 748, p. 1608; Spies v. Illinois, 123 U. S. 180; Wigmore on Ev., Sec. 2276.

competent for all purposes in the case, and if, by his own testimony, he can, if innocent, explain and rebut a fact tending to show his guilt, and he fails to do so, the same presumption arises from his failure as would arise from a failure to give the explanation by another witness, if in his power to give it.[1] He cannot, however, be compelled to give answers which will incriminate him.

[1] Rapalje, Law of Witnesses, Sec. 151; Stover v. People, 56 N. Y. 315.

# CHAPTER XVII

## DEFENSES

### ELEMENTS NECESSARY TO CONSTITUTE CRIME

**265. Common Law Crimes.**—To constitute a crime under the common law, there must be some act following upon an unlawful thought or evil intent. An act and an evil intent must combine to constitute in law a crime, and generally, perhaps always, they must concur in point of time.[1] An evil intent is a necessary element of every criminal offense at common law, and when not susceptible of direct proof it is to be implied from the circumstances, and the criminal intent and overt act must concur in point of time.[2] Persons, therefore, incapable of entertaining such intent cannot incur legal guilt. This inability may arise from mental incapacity, as idiocy, lunacy, or the like, or "insanity" employed in the large sense as including the whole.[3]

**266. Statutory Crimes.**—In addition to the offenses at common law, there are acts declared criminal by express enactment of the law-making power, and which are, therefore, called statutory crimes. In these the criminality of the act, or of the omission, constituting the offense, does not depend upon any question as to whether or not it is *malum in se*, or morally wrong in itself; but it is an offense, if proved, because it is *malum prohibitum*,

[1] Bishop's New Cr. Law, Sec. 206, 207.
[2] Am. and Eng. Encyc. of Law, Vol. 8, pp. 284, 285.
[3] See Bishop's New Cr. Law, Sec. 375, and note to Sec. 379.

or one which is wrong because prohibited by law, and which may, or may not, involve moral turpitude.

In statutory crimes intent may, or may not, be included in the law as a necessary element of the offense. If intent is an essential element, "lack of intent" may be shown, as in other crimes. But where no intent, necessary to constitute the crime, is prescribed by statute, the act or omission, when proved, is criminal, without regard to the intent with which it was committed. In such cases only the act or omission need be proved.[1] The lack of intent, and the absence of criminal motive, may, however, be set up in defense before a court-martial, as a ground for mitigation or release from punishment.

**267. Defenses.**—The term "defense" means a right possessed by the accused to place before the court every matter tending to defeat the accusation or any part thereof, and the form it takes varies with the form of the charges and the circumstances of the case.

The court should allow great latitude to the accused in making his defense. He must, however, abstain from contemptuous or disrespectful language toward the court, or his superiors in rank, and coarse and insulting language toward others. But he may, for the purpose of his defense, impeach the evidence and motives of the witnesses and prosecutor, and charge other persons with blame and even criminality, subject, however, if he does so, to any liability to further proceedings to which he would otherwise be subject. The court may caution the accused as to the irrelevance of his defense, but should not, unless in special cases, stop his defense solely on the ground of such irrelevance.[2]

**268.** As every crime under the common law consists of

[1] See Article 60, Chapter XXXI, post, par. 767; also Sections 3618–3652, Rev. Stat. U. S. and Sec. 86–95, Act March 4, 1909, 35 St. L. 1105–6, and Sec. 288 Id. 1145.

[2] Manual Military Law, War Office, England, 1894, p. 641.

two elements, intent and an act, if the intent is absent the act alone will not constitute the crime.

The defense may, therefore, show lack of intent, and this may be done:

*a.* When there is a complete or partial incapacity to commit crime through a defect of understanding. Under this class come such defenses as infancy, insanity, and drunkenness.

*b.* Where the understanding is not defective, but the circumstances so control the will as to lead it to a wrong conclusion of fact.

*c.* Where the will is constrained and the act compelled by force and violence.

**269. 1st. Incapacity through Defect of Understanding.**

**Incapacity Resulting from Infancy.**—Since criminal capacity depends upon the understanding rather than the age, there can be no fixed rule which will operate justly in every possible case but, under the common law, and, in general, under the law of most States, a child under the age of seven years is conclusively presumed incapable of entertaining a criminal intent, and cannot commit a crime. Between the ages of seven and fourteen the presumption still exists, but may be rebutted. After the age of fourteen he is presumed to have sufficient capacity, and must show affirmatively to the contrary.[1]

**270. Defect of Mind.**—Defect of mind as in idiocy, or imbecility resulting from some congenital defect or from some obstacle to the development of the faculties supervening in infancy, is looked upon in law as an absence of all mind, precluding the possibility of forming an intent or conception of the consequences of an act.

**271. Insanity.**—A person cannot be tried if he is insane, though he was sane when he committed the act, as he is

[1] Clark's Cr. Law, p. 49; Davis' Military Law, p. 125; Wharton, Cr. Evidence, Sec. 801.

deemed incapable of conducting his defense; nor can an insane person be sentenced and punished, even after conviction.[1]

Insanity may be the result of defective development of the faculties; as (*a*) idiocy or imbecility resulting from congenital defect or from an obstacle to the development of the faculties supervening in infancy; or (*b*) it may result from lesion of the faculties subsequent to their development resulting in (1) mania, mental or emotional, and either general or partial, or (2) in dementia consecutive to mania or injuries of the brain, or due to senility, peculiar to old age.[2]

Insanity in the form of mania or dementia, either general or partial, arising from lesion of the faculties subsequent to their development, may be subject to lucid intervals, during which responsibility for crime will attach to the person, so that at that time he is responsible for his acts, while he may be irresponsible at other times.

**272.** Moral insanity is a defect or disease or, more properly, a perverted condition of the moral system, where the person is mentally sane, and does not exempt one from criminal responsibility.[3] This condition is distinguished from irresistible impulse by the fact that the mind is not diseased as it is in the latter case.[4] Mere emotional insanity, or temporary frenzy or passion arising from excitement or anger and not from any mental disease, is never an excuse for crime.[5]

**273. Test of Capacity in Case of Insanity.**—The true test of responsibility lies in the word "power"; has the accused the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong?

[1] Clark's Cr. Law, p. 52; 4 Blackstone's Comm., p. 24; Bishop's New Cr. Law, Vol. 1, Sec. 396.
[2] Bishop's New Cr. Law, note to Sec. 379.
[3] Clark's Cr. Law, pp. 52, 58; Bishop's New Cr. Law, Vol. 1, Sec. 387.
[4] Clark's Cr. Law, p. 55.
[5] Id., p. 58.

If so he is responsible for the consequence of his act.[1]

**274.** The presumption of sanity attends an accused in every case, and where insanity is alleged as a defense courts differ as to the amount of proof necessary to acquittal. The courts of some States require insanity to be established "beyond a reasonable doubt;" some require "a preponderance of evidence," and others "a reasonable doubt only."

The Supreme Court of the United States, whose decisions should govern Federal Courts and Courts-martial, holds that it is sufficient for acquittal "if, on the whole evidence in the case, there is left a reasonable doubt as to whether the accused was sufficiently sane to be criminally accountable for his act."[2]

**275. Drunkenness.**—Temporary insanity, produced immediately by intoxication, does not destroy responsibility where the patient when sane and responsible made himself voluntarily intoxicated.[3] A person may, however, be so drunk when he commits an act that he is incapable, at the time, of entertaining the criminal intent which is the essential element of crime; especially is this true as to the intent to take life, or to commit larceny, or to pass counterfeit money.[4] This applies also to military offenses where specific intent is an element necessary to constitute the particular offense, such as desertion, disobedience of orders in violation of the 21st Article of War, mutiny, etc., provided that the drunkenness occurred before the act and was such as to disqualify the accused from forming the intent necessary in each case. But where the intent to commit the crime was formed when the accused was in possession of his faculties, voluntary drunkenness will not excuse the offense.

**276.** Where a person is too drunk, when he commits an act, to entertain specific intent, essential in order that the

[1] Davis' Military Law, p. 126; Desty's Am. Cr. Law, sec. 23*b*, p. 62; Guiteau's Case, 10 Fed. Rep. 202.

[2] Davis v. U. S., 160 U. S. 469; McClain's Cr. Law, sec. 179. See Guiteau's Case, 10 Fed. Rep. 202, note and references; Clark's Cr. Law, p. 59.

[3] Wharton, Cr. Law, vol. 1, sec. 49. [4] Id., sec. 52, 53.

act may constitute a particular crime, and did not first form such intent and then become intoxicated, he is not responsible for that particular crime; it is otherwise however if he makes up his mind to do an act, and then becomes intoxicated and commits it; he is then responsible.[1]

**277.** The drunkenness to constitute a defense, or to be admitted in evidence, need not be caused by indulgence in spirituous liquor, but may be the result of the use of an intoxicating drug.[2]

Drunkenness caused by morphine or other drug, prescribed by a medical officer of the Army or civil physician, may constitute an excuse for a breach of discipline committed by an officer or soldier, provided that it quite clearly appears that this was the sole cause of the offense committed, the accused not being chargeable with negligence or fault in the case.[3]

**278. Presumption.**—The presumption in criminal cases is that the accused had capacity to commit the crime, and the burden of proof to establish that he did not lies with the defense.

**279. 2d. Where the understanding is not defective but the circumstances so control the will as to lead it to wrong conclusion of fact.**

**Ignorance or Mistake of Law.**—Ignorance of the law is no excuse; every person is presumed to know the law, and ignorance of it will not exempt any one from responsibility. This rule sometimes seems to be a hard one, but it is necessary, because otherwise offenders would plead it in every possible case. In particular cases, however, it is sometimes made a ground for recommendation to mercy or even to pardon. The General Orders and Regulations of the Army published are presumed to be known to all officers and persons in the military service, and they are

[1] Clark's Cr. Law, pp. 62–63. See post, Chapter XXXI, Article 38, par. 745.
[2] Winthrop's Abr., 3d Ed., p. 112.
[3] Davis' Military Law, p. 127; Dig. Op. J. A. G. 1234.

bound to take notice thereof; plea of ignorance of them will not avail to excuse offenses against them.

**280. Ignorance or Mistake of Fact.**—Ignorance or mistake of fact will, as a rule, be accepted as exempting from criminal responsibility, but to this there are exceptions, as where the intention with which the accused acted was unlawful, or where the ignorance or mistake is voluntary or the result of negligence.

**281.** The ignorance of fact, to constitute a defense, must be an honest or innocent ignorance, and not an ignorance which is the result of carelessness or fault; and, in military cases, it must appear not to have proceeded from any want of vigilance, or from failure to make inquiries or obtain the information called for by the obligations and usages of the service.[1]

**282.** The wrongful intent being the essence of every crime, it follows that an act without fault or criminal carelessness by a person acting under mistake of fact, just as he would act if the facts were as he believed them to be, is not legally criminal, nor is a person criminally liable for an accident happening in the performance of a lawful act with due care; but if the accident happen while he is doing a criminal act he is responsible. So if a person intending to kill one person kills another, he is guilty of manslaughter or murder, according to the circumstances; or if in doing a lawful act he fails to use proper care he is responsible.

**283.** Provocation will not excuse from criminal responsibility, though it may form ground for mitigation of the offense.[2]

**284. Burden of Proof.**—The burden of proof is on the party setting up the defense of ignorance or mistake of fact, to show it and its innocence, and that he was not

[1] Winthrop's Abr. Military Law, 3d Ed., p. 110.
[2] Clark's Criminal Law, Sec. 38, p. 72.

chargeable with either negligence or want of reasonable care in the performance of the act charged,[1] the *prima facie* presumption being that what one does is with knowledge of the facts and intentional.[2]

**285. 3d. Where the will is constrained and the act compelled by force and violence.**

**Compulsion.**—Compulsion implies the doing of an act through force applied, or constraint of the will. No act can be criminal if it is impossible for a man to do otherwise. The force that is applied may be either actual or physical, or that of authority or fear. Where a man seizes the hand of another and uses it against his will to strike a blow no guilt attaches to the person so coerced; nor does it attach to a person committing an act under threats and imminent danger of instant death or grievous bodily harm.

This defense would extend to any commander compelled by the officers and soldiers under his command to give up or abandon his garrison, fortress, or post under the conditions mentioned in the 43d Article of War.[3]

**286.** Obedience to a legal order of a superior officer will constitute a complete defense. Where, however, the order of a superior seems to be illegal, in determining whether or not disobedience to it will be justified, it is held that the order must be obeyed "except in a plain case of excess of authority where at first blush it is apparent and palpable to the commonest understanding that the order is illegal";[4] and where the order does not expressly and clearly show its illegality on its face, the law should excuse the military subordinate when acting in obedience to the orders of his commander.[5]

[1] Davis' Military Law, p. 129.
[2] Bishop's Criminal Law, Vol. 1, Sec. 302–3.
[3] Davis' Military Law, pp. 127–128.
[4] Martin v. Mott, 12 Wheat. (25 U. S.) 19.
[5] U. S. v. Clark, 31 Fed. Rep. 717; In re Fair, 100 Fed. Rep. 149. See Dig. Op. J. A. G. 1853.

**287.** To justify, from a military point of view, a military inferior in disobeying the order of a superior the order must be one requiring something to be done which is palpably a breach of the law and a crime or an injury to a third person, or is of a serious character, not involving unimportant consequences only, and which, if done, would not be susceptible of being righted. An order requiring the performance of a *military* duty or act cannot be disobeyed with impunity unless it has one of these characters.[1]

**288. Married Women.**—Under the common law, when a married woman commits a crime in the presence of her husband, it is presumed that she did it under his coercion, but this presumption may be rebutted by evidence showing that there was no coercion. For the presumption to attach, the wife must have been in the immediate presence of her husband, or so near that he could have exerted his influence and control over her; she must have been in his actual or constructive presence. This presumption in the wife's favor will not, however, lie in case of murder, treason, or robbery, because these crimes show so much malignity as to render it improbable that she would be constrained by her husband, without the separate operation of her will, into their commission.[2]

**289. Alibi.**—Another form of defense is the *alibi*. This is in its nature a rebuttal of the evidence against the accused and intended to prove the impossibility of the crime having been committed by him, for the reason that he was "elsewhere" at the time of its commission, and at such a distance, or under such circumstances, that it was impossible for him to have been present at the place and time of its commission.

The burden of proof of establishing the crime and the connection of the accused with it remains with the prosecu-

[1] Dig. Op. J. A. G. 23.
[2] Bishop's New Criminal Law, Vol. 1, Sec. 361.

tion. The *alibi* may be established by a preponderance of evidence, and being fully established it is conclusive proof of the innocence of the accused. This is a very common form of defense in criminal cases, easily fabricated, and demands careful and scrutinizing investigation by the court before decision thereon.

**290. The Statement.**—The evidence and argument on both sides having been submitted, the accused, or his counsel for him, may make such statement for the defense as may seem advisable. If there be no stenographer present, this should be submitted in writing and is attached to the proceedings, as should also be the reply of the judge-advocate, if any is made. Such statements are not evidence and should not be made under oath, since all evidence before the court must be introduced through witnesses subject to cross-examination, or by matter subject to investigation.

In the practice of courts-martial prior to the enactment of the law which now authorizes an accused to testify in his own behalf, if he request it, the *statement* was the only way in which the accused could get before the court his own view of the facts, and matters of defense not appearing in the evidence. Since the law above referred to has been in force, what the accused says in his statement, as to facts outside the argument it may contain based upon the law or the evidence, lacks the weight it might otherwise have, because of not being stated upon his oath, as it might be if he so desired.

**291. Reply of the Judge-Advocate.**—In ordinary simple cases a reply by the judge-advocate is generally not necessary. But in important cases, or where any question has arisen as to acts which, under the law, constitute the particular crime charged, or as to any point of law or evidence, or as to matter contained in the statement or argument for the defense which demands it, he is en-

titled to reply and to explain as he deems necessary and advisable.

His remarks and conduct of the case, however, should be, as throughout the trial, entirely impartial, tending only to develop and make clear the actual truth concerning any matter in question.

## CHAPTER XVIII

### THE FINDING

**292.** The entire case having been concluded, both on the part of the prosecution and the defense, the court is then closed, the judge-advocate, reporter, accused, and his counsel, and all persons not members of the court retiring, and the court then proceeds to its finding upon the evidence submitted. The oath administered to the members (Article 84) requires them "to well and truly try and determine according to evidence" the matter before them, and this should be borne in mind in determining the finding. Any knowledge of the affair outside the evidence introduced, personal opinion, etc., cannot be permitted to enter into the determination of either the finding or sentence.

Courts-martial are, in one sense, "courts of honor," and their object in any case under trial is to ascertain the whole truth of the matter. Technicalities, such as those sometimes used in civil criminal courts to secure the acquittal of a prisoner, should not be encouraged, but avoided in military practice. A conviction or an acquittal by a military court ought to be arrived at after a full examination of all evidence introduced, and a firm conviction of the guilt or innocence of the accused based upon that evidence, and not upon argument by the parties or others with relation to technical points involved.

**293.** All members, whatever the rank of each, are

upon an equality in the discussions and deliberations of the court. The finding of the court should be governed by the evidence, considered in connection with the plea. Where no evidence is introduced, the general rule is that the finding should conform to the plea. But where the accused pleads guilty to the specification and not guilty to the charge, the court must determine whether the facts stated in the specification sustain the charge as a matter of law, and may find the accused guilty of both charge and specification.[1]

**294.** In all criminal cases the presumption of innocence attends the accused and it requires evidence "beyond reasonable doubt" to convict of crime, but not beyond all doubt. "A reasonable doubt is an honest substantial misgiving generated by the insufficiency of the proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or jury, and unwarranted by the testimony; nor is it a doubt born of a merciful inclination to permit the defendant to escape conviction, nor prompted by sympathy for him or those connected with him." "It is not a fanciful conjecture which an imaginative man may conjure up, but a doubt which reasonably flows from the evidence or want of evidence; a doubt for which a sensible man could give a good reason, which reason must be based upon evidence or want of evidence; such a doubt as a sensible man would act upon in his own concerns."[2]

**295.** The finding upon the specification must support the charge. In the case of a specification drawn under any charge, a finding of not guilty of the specification will necessitate a finding of not guilty of the charge. Where, however, there are several specifications, properly drawn, the finding of guilty upon one of them, although "not

[1] Dig. Op. J A. G. 1352.
[2] Davis' Military Law, p. 141; U. S. v. Newton, 52 Fed. Rep. 290.

guilty" of all the others, will sustain the finding of guilty, on the charge.

But if the finding on all the specifications be not guilty, or "find the facts as charged, but attach no criminality thereto," the finding upon the charge must be "not guilty."

**296.** When the accused pleads guilty to a charge and specification, or to the specification or charge with certain changes therein, and the court finds the facts according to the plea, it is sometimes stated that the plea of the accused is confirmed and he is found "not guilty" of the excepted words but "guilty" of any substituted words, with a corresponding finding as to the charge; and these findings should be definitely stated. And this may also be done in the finding, without such plea made, when justified by the evidence, and exceptions be made and correct words or allegations substituted, provided the exceptions and substitutions leave the specification still appropriate to the charges and legally sufficient thereunder.[1]

**297. Finding of Lesser Kindred Offense.**—The right and power of courts-martial to find not guilty of a particular offense charged under a specific article of war, but guilty of a lesser kindred offense, under another article, has long been established, and is sustained by the highest judicial authority, but should not be employed where the specific offense is established beyond a reasonable doubt.[2] This authority to find guilty of a minor included offense or to make exceptions or substitutions in the finding cannot justify the conviction of the accused of an offense *entirely distinct in its nature from that charged.*

Where an officer, for example, is charged with "conduct unbecoming an officer and a gentleman" under the 61st Article of War, the court may find the evidence as to the conduct stated in the specification insufficient to sustain that charge but yet sufficient to constitute "con-

[1] See par. 297; Dig. Op. J. A. G. 1355.
[2] Smith v. Whitney, 116 U. S. 183; Winthrop, Vol. 1, p. 544.

duct to the prejudice of good order and military discipline" under the 62d Article of War; and it may, thereupon, find him guilty of facts in the specification sustained by the evidence, and not guilty of the charge of violation of the 61st Article of War, but guilty of conduct to the prejudice of good order, etc., in violation of the 62d Article of War. But the reverse of this cannot be done; an officer charged under the 62d Article of War with "conduct to the prejudice of good order," etc., cannot be found "not guilty" of that charge, but guilty of "conduct unbecoming an officer and a gentleman" under the 61st Article. Nor can a conviction of a capital offense be made under a charge drawn as violation of the 62d Article of War, since it only covers cases not capital. In each of these cases the punishment would be greater than that authorized under the original charge, whilst, to justify the charge, the finding must be of a *lesser* included offense.

Of this form of verdict the most familiar is the finding of guilty of absence without leave under a charge of desertion. In such a case in its finding of guilty upon the specification, the court should in terms *except* the words "did desert" and "in desertion," and substitute therefor, respectively, the words "did absent himself without leave from" and "without leave," pronouncing him innocent of the excepted words and guilty of the substituted words, respectively.[1]

The finding upon the charge should regularly be "not guilty, but guilty of absence without leave, in violation of the 32d Article of War."[2]

**298.** Where a charge is laid under the general article (62), a finding under any other article, or, where a charge is laid under a specific article, a finding under any other specific article, would be illegal,[3] except as instanced, in the preceding paragraph, in the case of the 47th and 32d

[1] See ante, par. 296. [2] Court-martial Manual, pp. 46, 47. [3] Id.

Articles of War. The finding under the latter article being upon a charge under Article 47 is permissible, because "absence without leave" under Article 32 is a necessary element, a minor included offense of the absence without leave, which enters into the offense of desertion, under Article 47.

Where a charge is laid under a specific article, and the material allegations in the specifications, being proved, do not fully sustain the charge as laid, but do clearly establish neglect of military duty or disorder, in breach of military discipline, the accused may be found guilty of the specifications and not guilty of the charge, but guilty of conduct to the prejudice of good order and military discipline, in violation of the 62d Article of War.[1]

**299.** In exceptional cases of acquittal, where circumstances justify it, courts-martial sometimes use the words "fully" or "honorably" or "fully and honorably" acquit the accused. But such occasions seldom arise, and the use of those words is intended to relieve the accused of any suspicion of wrong that might attach through his being brought to trial.

**300.** The court, in addition to its findings, may also comment upon the charge as malicious or not well founded and may criticize the action of the accuser or prosecutor, or comment upon the improper conduct of a witness, the judge-advocate or the counsel; and, when occasion justifies it, may reflect upon the state of discipline of a command as disclosed by the evidence, with a view to correction thereof by the proper authority. But such remarks should always be justified by the circumstances as disclosed in the record of proceedings.

[1] Dig. Op. J. A. G. 1361; Winthrop, Vol. 1, p. 544.

## CHAPTER XIX

### PREVIOUS CONVICTIONS

**301.** Whenever a soldier is convicted of an offense for which a discretionary punishment is authorized, courts-martial will receive evidence of previous convictions, if there be any.[1] They will, however, consider only such evidence of previous convictions as is referred to them by the convening authority.

**302.** It is provided by Act of September 27, 1890, that "whenever by any of the Articles of War for the government of the Army the punishment on conviction of any military offense is left to the discretion of the court-martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe." Provision has been made in the order of the President, dated June 12, 1905, amended by order of November 25, 1908, prescribing "limits of punishment," for the consideration of "previous convictions," when there has been a finding of guilty in such cases. This order being operative only in time of peace, courts-martial, in time of war, revert to their original discretionary powers,

**303.** By "previous conviction" is meant a conviction where the sentence has been approved by competent authority. It is to be noted that where the post commander, being the only officer present, sits as a summary court, no

[1] A. R. 971; Executive Order, G. O. 96, War Dept. 1905; G. O. 204, War Dept. 1908, Appendix D.

further approval of the sentence is required by law.[1] When the findings and sentence of a court-martial have been disapproved by the proper reviewing authority, evidence of such previous conviction is not admissible.[2]

**304.** The order of the President establishing the limits of punishment applies to "enlisted men" only. It does not apply to trials of officers or cadets.

**305.** All charges against an enlisted man, forwarded to the authority competent to order a general court-martial for his trial, must be accompanied by a statement of service, properly filled out in the prescribed form, together with the proper evidence of previous convictions, if any, a brief statement of the evidence expected from each witness, together with a statement of any other evidence available in the case. Charges submitted to a garrison or regimental court-martial must be accompanied by the proper evidence of previous convictions.[3] Charges submitted for trial by a summary court should be accompanied by evidence of previous convictions, to be furnished, when practicable, by the officer preferring the charges; or, if the evidence of previous conviction is contained in the summary court record, a reference to it will be sufficient, and, if this evidence is not submitted or cited, the summary court may take judicial notice of any such evidence which that record contains.[4]

**306.** The evidence of previous convictions is limited (except in case of previous convictions of desertion, on a trial for desertion) to previous convictions by courts-martial of an offense or offenses within one year preceding the date of commission of any offense charged and during the current enlistment.[5] These convictions must be proved

[1] Court-martial Manual, p. 47, note.
[2] Dig. Op. J. A. G. 2052.
[3] A. R. 962, 964; G. O. 96, War Dept. June 19, 1905, Article III, Sec. 1; G. O. 204, War Dept. 1908, Appendix D.
[4] A. R. 964.
[5] See G. O. 96, War Dept. 1905, Article III, Sec. 1, 5; G. O. 204, War Dept. 1908, Appendix D.

by the records of previous trials and convictions, or by duly authenticated copies of such records, or by duly authenticated copies of the orders promulgating such trials and convictions.[1]

**307.** On a conviction of desertion, evidence of convictions of previous desertions may also be introduced, irrespective of the enlistment or of the period which may have elapsed since such conviction or convictions.[2] Previous convictions of other offenses may be introduced as explained in the preceding paragraph.

**308.** The proper evidence of previous convictions by a summary court is the copy of a summary court record furnished to company and other commanders, as required by par. 965, Army Regulations, or one furnished for the purpose, and certified to be a true copy by the post commander or adjutant of the post where the original record of trial by summary court is kept.[3] When it is impracticable to obtain copies certified by the adjutant or commanding officer of the post where the trial is held, the copy furnished the company commander should be forwarded with the charges and read to the court in evidence. This copy, belonging to the company or other commander, if furnished, must be returned to him after being presented before the court, a copy of it being attached to the record of the court.

**309.** Previous convictions submitted must be convictions by military courts; convictions by civil courts will not be received or considered. They are not, however, limited to convictions of offenses similar to the one for which the accused is being tried, the object of their submission being to see if the prisoner is an old offender, and therefore less entitled to leniency than if

[1] G. O. 96, War Department, June 19, 1905, Article III, Sec. 1; A. R. 971; G. O. 204, War Dept. 1908, Appendix D.
[2] G. O. 96, War Dept. June 19, 1905, Article III, Sec. 5; G. O. 204, War Dept. 1908, Appendix D.
[3] A. R. 971.

on trial for his first offense. They have no bearing upon the question of guilt of the particular charge on trial, but only upon the amount and kind of punishment to be awarded.[1] The statute of limitations does not, therefore, apply to them on their introduction.

The evidence of previous convictions having been received, the court is again closed and proceeds to award its sentence

Court-martial Manual, p. 48.

## CHAPTER XX

### SENTENCE AND PUNISHMENT

**310.** When the jurisdiction of a military court has attached, this includes the power to hear and determine the case, and to award the sentence.[1] The sentence being awarded and approved, it is the duty of the reviewing authority to execute or enforce it, or to forward it to the authority having power to execute or enforce it.

If the accused be found not guilty he is acquitted. If, however, he has been found "guilty" by vote of the court, and the evidence of previous convictions has been received, the court is thereupon closed and proceeds to award its sentence. When the conviction is upon a charge drawn under an article of war carrying a mandatory punishment the sentence therein prescribed is the only one that can be awarded. But if the sentence is left to the discretion of the court it is only limited by such discretion and by the order of the President prescribing the limits of punishment in such cases.[2]

**311.** In such cases of discretionary punishment the members of the court, or so many of them as desire to do so, prepare sentences in writing considered by them as adequate to the offense, and submit them to the president, who reads them to the court after all are submitted, and then proceeds to take the vote thereon beginning

[1] Carter v. McClaughry, 183 U. S. 383.

[2] See G. O. 96, War Department, 1905; ante, par. 304, and post, par. 325; G. O. 204 War Dept. 1908, Appendix D.

with the mildest sentence, which, if lost, is followed by the next mildest and so on till one is found to which a majority of the members agree.[1]

**312.** The death sentence can only be given in the cases expressly provided in the Articles of War, or by Sec. 1343, Revised Statutes, and requires concurrence of two-thirds of the members of the general court-martial, as prescribed by the following article:

Article 96.—No person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned.

As to the responsibility of members in voting on the sentence who have noted "not guilty" on the finding, see post, Chapter XXII, par. 375.

**313. Sentence to Penitentiary.**—Usually persons convicted by courts-martial are punished, when sentenced to confinement, in military prisons or post guard-houses, but provision has been made by law for punishment, by confinement in a penitentiary, of military offenders who have committed offenses which are also recognized as crimes in civil law; but they must be of a character recognized as crimes punishable by such law.

Article 97.—No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment.[2]

This article does not prescribe the degree of punish-

[1] In case of a tie vote, see post, par. 376.
[2] See Art. 97, post, par. 804.

ment to be awarded as does Article 58; it may be greater or less than that provided by the statutes of the State, Territory, or District, but its character is such as, under those statutes or laws, would subject a person convicted of the offense to confinement in a penitentiary.

**314.** Before sentencing a person convicted of a crime to a penitentiary the court-martial must, therefore, examine the laws of the United States, and of the State, Territory, or District in which the offense was committed, to determine whether such punishment is authorized thereby; and whenever there is any doubt in the mind of the court as to whether it is so punishable the sentence to confinement should include such words as "in such place as the reviewing authority may direct."[1] The sentence, to authorize confinement in the United States Penitentiary, at Fort Leavenworth, must be one imposing confinement for "more than one year."[2]

**315.** Department commanders will designate the United States Penitentiary at Fort Leavenworth, Kansas, as the place of execution of such sentences where the term of confinement is for more than one year, or, with the approval of the Secretary of War, may designate a penitentiary within a military department if in any State or Territory within the department provision has been made by law for the confinement of such prisoners in its penitentiaries.[3]

**316.** Provision is also made for the trial of certain offenses in time of war, insurrection, or rebellion, by courts-martial and the awarding of punishment, which shall not be less than that provided for like offenses by the laws of the State, Territory, or District in which these occur.

Article 58.—In time of war, insurrection or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding,

[1] A. R. 974: see In re Brodie, 128 Fed. Rep. 665. [3] A. R. 975.
[2] A. R. 975.

by shooting or stabbing, with an intent to commit murder, rape, or an assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or District in which such offense may have been committed.[1]

The limitation herein made is that the punishment shall not be *less* than that provided by the laws of the State, etc., but there is no limitation upon the awarding of a punishment in excess of that provided by those laws. It may sometimes be necessary, in time of war and public danger, to award more severe punishment to persons in military service in order to preserve discipline and assure safety of the inhabitants.

**317. Sentence to Military Prison.**—For offenses purely military in character, such as desertion, disobedience of orders, and the like, offenders cannot be sentenced and punished by imprisonment in a penitentiary, but must serve the confinement awarded in a military prison or post guard-house. For all simple misdemeanors and offenses not serious in nature, where the offenders have not been sentenced to dishonorable discharge, they are usually sentenced to confinement at hard labor under charge of the post guard, and are called "garrison prisoners." But where the offense is such that "dishonorable discharge" is awarded as well as confinement at a military post or elsewhere, such persons become "military convicts,"[2] and where the period of confinement to which they are sentenced is six months or more they are sent to certain posts designated by the Secretary of War. In such cases, or those involving long imprisonment, the sentence may read "to be confined in such

[1] See Art. 58, post, par. 765. [2] A. R. 936.

place as the reviewing authority may direct," for the fixed period of punishment.[1]

**318. Date Sentence Takes Effect.**—The date upon which a sentence becomes effective is that of the action of the reviewing authority unless another date is specified. In case of dishonorable discharge from the service, however, it becomes effective when the order promulgating it has been received at the place where such sentence is to be executed.[2] When the date for the commencement of a term of confinement is not expressly fixed by the sentence, the term of the confinement begins on the date of the order promulgating it, which should, if practicable, be of the same date as the action of the reviewing authority. If the action of the reviewing authority and the order promulgating the sentence are not of the same date, the date of his action will be stated in the order and that will be the date of the beginning of the sentence.[3] The sentence is continuous until the term expires, except when the person sentenced is absent without authority.[4]

**319.** The word "month" or "months" when employed in a sentence is to be construed as meaning a *calendar* month or months.[5] The word "imprisonment," as used in the 60th Article of War, was not employed in a technical sense to signify imprisonment at a military post without hard labor, but has a broader signification, and empowers a court-martial to sentence a person in the military service to imprisonment at hard labor, or to a penitentiary where hard labor is a part of the discipline, where the offense of which he is convicted is one for which the civil tribunals could impose a like sentence.[6]

[1] See A. R. 974. The U. S. Military Prison, for military prisoners, and the U. S. Penitentiary, for convicts, are both established at Fort Leavenworth, Kansas, and are under separate administration.
[2] Dig. Op. J. A. G. 1155.
[3] A. R. 979.
[4] A. R. 978.
[5] Dig. Op. J. A. G. 2319.
[6] In re Langan, 123 Fed. Rep. 132.

**320. Confinement after Expiration of Enlistment.**—The sentence may extend beyond the period of enlistment, but no sentence of a court-martial can extend the term of service of a soldier under his enlistment contract beyond the term for which he enlisted. In case, therefore, of a sentence which, without discharging the soldier, runs beyond his term of enlistment the soldier's discharge should be made upon the date that he is entitled to it, but it will not be delivered to him but held by the authorities of the prison where he is serving his confinement until his discharge therefrom.

**321.** In all cases where discharge and confinement are united in a sentence it is always advisable to sentence the prisoner first to be discharged and then to be confined for the period designated. This relieves his immediate commander from carrying him longer on the rolls and enables the prisoner to be replaced by a man who can be called upon for the performance of military duties.

**322. Sentence in Excess of Law.**—Where a court has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such part of it as may be in excess open to question and attack.[1] In case of excessive sentence, so much as is legal may be approved by the reviewing authority and duly executed.[2] And where punishment is adjudged upon conviction of the accused on several charges, it is valid and operative provided that it is a punishment legally imposable on conviction of any one of the charges of which the accused has been duly convicted.[3]

**323.** The sentence awarded by a court-martial, if within

[1] U. S. v. Pridgeon, 153 U. S. 49,
[2] Dig. Op. J. A. G. 1651.
[3] Id. 2311; Carter v. McClaughry, 105 Fed. Rep. 614; Id., 183 U. S. 386.

legal limits, is wholly within its own discretion. The court cannot be directed as to what its sentence shall be, though the reviewing authority may return it for revision as inadequate or improper; but his power ends there and he cannot compel the court to change its sentence in opposition to its own judgment.

**324. Reconsideration.**—The court may, however, reconsider and change its sentence at any time so long as its record of the case is within its own possession before being forwarded, or when it has been returned to it for revision or further consideration.

## CHAPTER XXI

### PUNISHMENTS

**325.** The punishments to be awarded on conviction of military offenses are either *mandatory* or *discretionary.*

Where they are mandatory in the Articles of War and in Sec. 1343, Revised Statutes, no other than the prescribed punishment can be given; it can neither be lessened nor increased by the court.

Certain articles of war, however, prescribe that the accused upon conviction "shall suffer such punishment as the court may direct." This leaves the matter of punishment in the discretion of the court except where restricted by the Executive Order prescribing the limits of punishment, authority for which is conferred upon the President by Act of Congress of September 27, 1890, and where not so restricted they are governed by the customs of the service as applicable to each case within the discretion of the court. The court should always take into account the fact that the object of punishment is not to take vengeance for the deed but to prevent crime and the repetition of the offense by the offender and to deter others from similar acts.

The law under which the President prescribes the maximum limit of punishment provides "that whenever by any of the Articles of War for the government of the Army the punishment on conviction of any military offense is left to the discretion of the court-martial the punishment therefor shall not, in time of peace, be in excess of a limit which the president may prescribe."[1]

[1] Act September 27, 1890.

The Executive Order is published by the War Department,[1] and is applicable to enlisted men only.[2]

### FORMS OF PUNISHMENT

**326.** Of the punishments recognized as proper to be imposed, some forms may be awarded to either officers or enlisted men; some are appropriate for officers only, and others for enlisted men only.

**For Officers.**—The punishments that may be awarded officers, "depending on the nature of the offense, are death, dismissal, suspension from rank, command, or duty, with or without loss of pay or part of pay, loss of rank,[3] imprisonment, fine or forfeiture of pay, reprimand, and confinement to limits of the post or reservation."

**327. For Enlisted Men.**—"The legal punishments, depending on the character of the offense and the jurisdiction of the court," which may be given to enlisted men "are, death, confinement, confinement on bread and water diet, solitary confinement,[4] hard labor, ball and chain, forfeiture of pay and allowances, dishonorable discharge from the service;[5] for first-class privates reduction to second-class privates and reprimand; for non-commissioned officers, reductions to the ranks also;[6] and for "candidates for promotion," deprivation of all rights and privileges arising from a certificate of eligibility.[7]

[1] G. O. 96, War Dept. 1905, amended by G. O. 204, War Dept. 1908, Appendix D.

[2] Carter v. McClaughry, 183 U. S. 365.

[3] The "loss of rank" as here used actually means "loss of files." The specification that the accused shall lose a certain number of files in rank is sufficient in the finding. It is not necessary to state the new number of the accused on the list or the name of the officer below whom he will be placed thereby.

[4] Confinement without hard labor should never be imposed.

[5] A dishonorable discharge is an entire expulsion from the Army and covers all unexpired enlistments.

[6] Post non-commissioned staff officers and hospital sergeants (first class), though liable to discharge for inefficiency or misconduct, will not be reduced (A. R. 102 and 1426).

[7] Court-martial Manual, p. 49.

**328. Death.**—This sentence may be awarded to either officers or enlisted men in cases provided by law; but no person can be sentenced to death except in cases expressly mentioned in the Articles of War, or in cases of spies as specified in Sec. 1343, Revised Statutes United States, as so punishable. The manner of inflicting the punishment of death (except for offenses purely military) is by hanging;[1] and this is the proper method of execution of a sentence when given for offenses under the 58th Article of War. Death by hanging is looked upon by military persons as more ignominious than death by shooting, and is the usual method of execution designated in case of spies, or persons guilty of murder in connection with mutiny, or, sometimes, for desertion in the face of the enemy; but for a purely military offense like a sentinel sleeping on his post, such sentence when imposed is usually "to be shot to death with musketry." For the sake of the example and to deter others from like offenses these sentences are executed in the presence of the troops of the command, assembled to witness them.

**329.** A court-martial, in imposing the sentence of death, should not designate the time and place for its execution, such designation not being within its province, but pertaining to that of the reviewing authority. If it does so designate, this part of the sentence may be disregarded, and a different time and place be fixed by the commanding general.[2] If the designated day passes without execution the same authority, or his superior, may name another day, the time of execution being an immaterial element of this punishment.[3]

**330.** The sentence of death is mandatory under the 57th Article of War against all persons belonging to the armies of the United States, in time of war or rebellion, who force a safe-guard.

[1] Sec. 323, Act March 4, 1909, 35 St. L. 1151.
[2] Dig. Op. J. A. G. 286. [3] Id. 287.

A safe-guard is a protection granted to persons or property within the theater of military operations. This protection may consist in a guard composed of one or more soldiers, usually furnished with a paper, signed by the commanding general and his adjutant-general, naming the persons or property to be guarded and commanding all officers and soldiers to respect this safe-guard and, if necessary, to protect such persons or property; but this document, fully and exactly describing the persons and property it is intended to safe-guard, and stating a limit of time for which it is to be held good, may be posted upon the property or be delivered to the party whose person, family, or property it is intended to protect, and when so held it is equally valid.

Violation of a safe-guard is a most serious offense against discipline, being a wilful disobedience of the orders of the commander.

**331.** Several articles of war [1] prescribe the death penalty for offenses committed thereunder, but permit modification thereof by the court; these are as follows: for striking, drawing or lifting up a weapon, or offering violence against his superior officer, or disobeying his lawful command;[2] beginning, exciting, causing, or joining in a mutiny or sedition;[3] being present at any mutiny or sedition, and not endeavoring to suppress the same, or having knowledge that mutiny or sedition is intended, and not informing his commanding officer thereof;[4] a sentinel sleeping upon his post;[5] occasioning false alarms;[6] misbehavior before the enemy or abandoning fort, post, or guard;[7] compelling a commander to surrender;[8] making known

[1] See Chapter XXXI, post, par. 705 et seq.
[2] Art. 21. See post, par. 728.
[3] Art. 22. See post, par. 729.
[4] Art. 23. See post, par. 730.
[5] Art. 39. See post, par. 746.
[6] Art. 41. See post, par. 748.
[7] Art. 42. See post, par. 749.
[8] Art. 43. See post, par. 750.

the watchword, or giving a parole or watchword different from that which he received;[1] relieving the enemy, or knowingly harboring or protecting him;[2] holding correspondence with or giving intelligence to the enemy;[3] desertion in time of war;[4] doing violence to persons bringing provisions or other necessaries into camp, garrison, or quarters of United States forces in foreign parts.[5]

The sentence of death, though it cannot be mitigated, *i.e.*, reduced in amount or quantity, may be remitted or commuted by the President.[6]

**332. Dismissal.**[7]—This sentence is appropriate for officers and cadets only, and is not awarded to enlisted men; in their cases separation from the service through trial by court-martial is effected by sentence to "dishonorable discharge."

The sentence of dismissal is mandatory upon conviction of an offense under certain articles of war, as in case of receiving money or other things for mustering, etc.;[8] false muster;[9] false returns;[10] false certificate;[11] wilfully losing, spoiling, or damaging military stores;[12] laying duty or imposition upon, or having an interest in, sales of articles for the use of soldiers;[13] sending or receiving challenges to fight a duel;[14] suffering a person to go forth to fight a duel, or acting as second or promoter thereof;[15] drunkenness

[1] Art. 44. See post, par. 751.
[2] Art. 45. See post, par. 752.
[3] Art. 46. See post, par. 753.
[4] Art. 47. See post, par. 754.
[5] Art. 56. See post, par. 763.
[6] Dig. Op. J. A. G. 341.
[7] See Chapter XXXI, post, Art. 106, par. 813.
[8] Art. 6. See post, par. 713.
[9] Art. 5 and Art. 14. See post, par. 712 and 721.
[10] Art. 8. See post, par. 715.
[11] Art. 13. See post, par. 720.
[12] Art. 15. See post, par. 722.
[13] Art. 18. See post, par. 725.
[14] Art. 26. See post, par. 733.
[15] Art. 27, 28. See post, par. 734, 735.

on duty;[1] knowingly receiving or harboring a deserter;[2] refusing or neglecting, except in time of war, to deliver an accused officer or soldier to a civil magistrate for an offense against the laws of the land, or to assist in apprehending him;[3] conduct unbecoming an officer and a gentleman;[4] breach of arrest.[5]

This sentence may also be awarded in cases not mandatory but where the sentence is discretionary with the court.

**333.** A legal sentence of dismissal, duly confirmed and executed, separates the officer or cadet entirely from the service, and is beyond the reach of the pardoning power; the person dismissed can only be restored to the service by a re-appointment, and, in case of an officer, subsequent confirmation by the Senate.[6]

**334.** While this sentence cannot be mitigated it is subject to commutation by the President. It may be commuted to suspension, loss of files, or other punishment less severe than dismissal, in case of officers, or suspension in case of cadets; and in case of enlisted men "dishonorable discharge" may be commuted by forfeiture of pay. "The power to remit or commute sentences of death and dismissal remains with the President" and cannot be exercised by the military commander.[7]

**335. Summary Dismissal.**—In time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial, or in mitigation thereof.[8]

In time of war, however, the President has the power to summarily dismiss an officer, but in such case the officer

[1] Art. 38. See post, par. 745.
[2] Art. 50. See post, par. 757.
[3] Art. 59. See post, par. 766.
[4] Art. 61. See post, par. 768.
[5] Art. 65. See post, par. 772.
[6] See Sec. 1228, Rev. Stat. U. S.
[7] Dig. Op. J. A. G. 341.
[8] Art. 99. See post, par. 806; Sec. 1229, Rev. Stat. U. S.

is authorized to make application, within reasonable time, for trial by court-martial, which the President shall convene as soon as the necessities of the service permit, and if such court is not convened within six months from the presentation of the application, or when convened it does not award dismissal or death as the punishment, the order of dismissal is void.[1] Dismissal does not attach any legal disability to the person dismissed, and he is not disqualified from re-appointment to the Army or from enlisting as a soldier or from holding civil office under the United States, except where specifically disqualified therefrom by law.[2]

**336.** Cadets found guilty of participating in, or encouraging or countenancing, hazing at the United States Military Academy shall be summarily expelled from the Academy; and any cadet convicted of such offense shall not thereafter be re-appointed to the corps of cadets or be eligible for appointment as a commissioned officer in the Army, or Navy, or Marine Corps, until two years after the graduation of the class of which he was a member.[3]

**337. Suspension.**—Suspension may be from rank, command, or duty, and pay and allowances, or from either or from all of them. It is applicable to officers only, and not to non-commissioned officers among enlisted men.[4] Suspension from rank and command does not deprive the person sentenced of pay and allowances unless that forfeiture is specifically stated in the sentence; nor does it involve a condition of arrest or confinement.

**338. Suspension from Rank.**—This sentence includes suspension from command, and, while it does not deprive

[1] Revised Statutes U. S., Sec. 1230.
[2] Dig. Op. J. A. G. 1201. See post, Art. 14, par. 721, and Art. 106, par. 813.
[3] Act March 2, 1901.
[4] Dig. Op. J. A. G. 2423, note.

the person of his office, and he remains subject to military control, he is entirely cut off from any promotion to which he may become entitled during the period of his suspension; but it does not deprive him of the right to gain files in his own grade. An officer under suspension has the same right to quarters as when on duty status, if present at the post.[1]

**339. Suspension from Command.**—This is included in "suspension from rank" but may be awarded separately, and "when a court-martial suspends an officer from command it may also suspend his pay and emoluments for the same time." [2]

**340. Pay and Allowances.**—Any forfeiture or suspension of pay or allowances must be specifically stated in the sentence, without which they cannot be forfeited. All forfeitures accrue to the United States, and cannot be appropriated to settle indebtedness to individuals or for the benefit of other parties.[3]

**341. Loss of Relative Rank, or Files.**—This punishment is applicable to officers only. It becomes effective on the approval of the reviewing authority, not requiring confirmation by the President, and deprives the officer of the rights and privileges of his original rank. As its effect continues until the sentence is remitted it is a continuing punishment. Promotion of such an officer would be equivalent to a pardon, but his pardon, after promotion, would not restore him to the position he had previously held relative to others already promoted, nor divest others of the rights acquired by promotion during the pendency of his reduction. That part of his sentence has been fully executed and is therefore beyond the reach of the pardoning power.[4]

[1] A. R. 1042.
[2] Art. 101. See post, par. 808.
[3] See Forfeitures and Stoppages, post, par. 351–357.
[4] Dig. Op. J. A. G. 1632.

**342. Imprisonment.**—Imprisonment may be awarded as a punishment for either officers or soldiers, but to officers only on conviction of most serious crimes and in connection with the sentence of dismissal to be followed by confinement. But where a fine is imposed as a penalty under the 60th Article of War the sentence may also impose a certain period of confinement, or a continuation of any imprisonment otherwise awarded, not to extend beyond a term stated in the sentence, for the purpose of enforcing payment of the fine unless the fine is paid prior thereto.

**343.** When a sentence inflicts the penalty of dismissal of an officer, or the dishonorable discharge of a soldier, with imprisonment, that part of the sentence imposing dismissal or discharge should precede that part relating to his confinement, so that the accused shall first be dismissed or discharged, and "thereafter" be confined for the period stated; and where "hard labor" is intended it should be stated in the sentence; "hard labor" being a distinct punishment, which must be specifically awarded. The term of the imprisonment must also be given in the sentence.

**344.** Officers or soldiers may be sentenced to imprisonment in a penitentiary, but the offense of which such person is convicted must be one so punishable upon conviction thereof, under the laws of the United States, or of the State, Territory, or District in which the offense was committed, as provided by the 97th Article of War. Where the sentence is for a year or less, the U. S. Penitentiary is not available as a place for its execution.[1]

**345.** If a prisoner is sentenced to a penitentiary he becomes subject to all the rules and discipline prescribed by law for the institution, including those which require labor, though labor may not have been specified in the sentence.

[1] See ante, par. 313 and A. R. 975.

But in prisons other than penitentiaries a prisoner sentenced to imprisonment without "hard labor" being included in the sentence cannot properly be put to unusual labor of a severe and continuous character; but he may be required to perform the ordinary domestic or police work directed by the sanitary regulations of the prison.[1]

**346. Solitary Confinement.**—In addition to imprisonment there may be given, as punishment for enlisted men only, solitary confinement, or solitary confinement on bread and water diet. Such confinement is limited to fourteen days at one time, not to be repeated until fourteen days have elapsed, and not to exceed eighty-four days in one year.[2]

**347. Ball and Chain.**—This punishment is only awarded in extreme cases where escape is feared or where the prisoner is considered to be of a desperate or dangerous character. Such a sentence should state the weight of the ball and the length of the chain to which it is to be attached.

**348. Imprisonment after Expiration of Term of Service.**—An officer dismissed, or a soldier discharged, by sentence of a court-martial, may at the same time be sentenced to a period of imprisonment extending beyond the date of his dismissal or discharge, and be held thereto notwithstanding he has been separated from the military service. Such persons are no longer soldiers but military p isoners or convicts, offenders legally sentenced for violation of the laws of the United States.

**349.** A soldier may also, without discharge attached thereto, be sentenced to a term of imprisonment extending beyond his term of enlistment, and, notwithstanding its expiration, may be held until he has completed the term of imprisonment to which he has been sentenced.

[1] Dig. Op. J. A. G. 1464.

[2] G. O. 96, War Dept. 1905, Article VII: G. O. 204, War Dept. 1908, Appendix D.; Court-martial Manual, p. 49.

It is always preferable, however, that the court award dishonorable discharge preceding the sentence of imprisonment when it accompanies it. If the sentence does not award "dishonorable discharge" the discharge of the soldier is dated, and takes effect, on the date of expiration of the enlistment but is not delivered until expiration of the sentence.[1]

**350. Fine.**—A fine differs from a forfeiture or stoppage, in that it is a fixed sum which must be paid and is not deducted from pay due or to become due. It is especially recognized as a form of punishment in the 60th Article of War. It is usually accompanied in the sentence by a provision, in order to enforce collection, that the person convicted shall be imprisoned until the fine is paid, or until a fixed period of time, considered as an equivalent punishment, has expired. These fines as well as forfeitures accrue to the United States, and cannot be imposed or collected for the benefit of any individuals.

**351. Forfeitures.**—A forfeiture is the losing of the right to pay, allowances, etc., through some act to which such penalty attaches, or through sentence of a court-martial. Such as attach through the operation of law are effective whether included in the sentence of a court-martial or not, such as forfeiture of pay by deserters, if convicted, etc. Other forfeitures can only be imposed under legal sentences of a court-martial, and the character and amount of the forfeiture adjudged must be explicitly stated in the sentence; there can be no forfeiture by implication. Forfeiture runs only so long as the soldier remains in the service under his current enlistment; his discharge operates as a remission, and any balance due cannot be collected if he should re-enlist. When a forfeiture is adjudged the sentence should distinctly state that it is of a certain specified sum from pay due or to become due, or, if cover-

[1] For classification of prisoners, see ante, par. 317.

ing more than the amount of one month's pay, that the forfeiture is of a specified sum per month (not larger than the monthly pay of the accused), for a specified number of months; or it may be the forfeiture of all pay, or of all monthly pay and allowances, for a certain number of months.

Where the forfeiture is of pay or any part thereof for a certain number of months it stops, for each of those months, the amount stated. A forfeiture of ten dollars of monthly pay for one year would mean a forfeiture of $120.00.

352. When the sentence is silent as to the date of commencement of the forfeiture it will begin with the period for which pay has accrued since last payment. A forfeiture not limited by the sentence to any particular month or months or other space of time, but expressed simply as a forfeiture of so many months' pay, or of a certain amount of pay, is legally chargeable against pay due and payable at the next payment, and the balance, if any, against pay accruing thereafter, until the forfeiture is fully satisfied,[1] the rate of forfeiture being the rate of pay at the date of promulgation of the sentence.

353. Where an accused is brought to trial under a charge of desertion and acquitted, or convicted of "absence without leave" only, any amount paid as a reward for his arrest is not stopped against his pay unless, in case of conviction of absence without leave, the sentence of the court shall so direct. In such case the sentence should direct the charge against him to take the form of a stoppage, and not a forfeiture.[2] If convicted of desertion, or if restored to duty without trial, the expenses incurred in his apprehension and delivery, including the cost of transportation of the guard, will be set against his pay.[3]

If a soldier be brought to trial for absence without

[1] A. R. 985; G. O. 135, War Department, 1905.
[2] A. R. 127; G. O. 144, War Department, 1906.
[3] A. R. 126.

leave and convicted, or for desertion and is convicted of absence without leave only, the soldier will be charged with the expense of transportation of himself and guard to his proper station. It is not necessary for the court to include this charge in its sentence. The company commander will make the charge without the action of the court.[1]

**354.** All fines and forfeitures revert to the United States; courts-martial have no power or authority to compel payment of civil claims, or of personal indebtedness, except to the United States.

**355. Stoppages.**—A stoppage differs from a fine or forfeiture in that it is not a punishment awarded but a reimbursement, and may be made without the sentence of a court-martial, as well as if included therein, when made in pursuance of law or regulations. It is a deduction made from the pay or allowances of a person in military service for the purpose of reimbursement to the proper bureau or department of the United States for loss or damage to public property pertaining thereto. It may also be made in certain cases, under the provisions of law, for the Soldiers' Home;[2] for the payment of indebtedness to tailors;[3] to traders and laundrymen at depots for recruits;[4] for repairs of damages done to arms, equipment, or implements;[5] purchases of articles from the subsistence department on credit;[6] or tobacco;[7] for clothing overdrawn;[8] and for the Post Exchange.[9] Stoppage may

[1] Court-martal Manual, p. 50; A. R. 126.
[2] Sec. 4818, 4819, Rev. Stat. This deduction is not now applicable to enlisted men. Appropriation Act, June 12, 1906; G. O. 115 and 144, War Dept. 1906, A. R. 1389; Act May 11, 1908; G. O. 80, War Dept. 1908.
[3] Sec. 1220, R. S.
[4] Act Juue 30, 1882; G. O. 72, H. Q. A. 1882. See also A. R. 348; G. O. 159, War Dept. 1906.
[5] Sec. 1303, R. S.
[6] Sec. 1300, R. S.
[7] Sec. 1301, R. S.
[8] Sec. 1302, R. S.
[9] A. R. 352.

also be made to repay injuries done to citizens, under the authority of the 54th Article of War, and in this case if the particular offender or offenders be not discovered the amount may be apportioned among the entire command.

**356.** Stoppages are entered upon the muster and pay rolls of enlisted men, and the signing of the rolls is considered as an acceptance of the charge by them. Officers are notified of stoppages, which must be made under the authority of the Secretary of War, and they are removable only when collected, or the deficiency, or other fact causing the stoppage, is satisfactorily explained.[1]

**357.** If there is any dispute or question as to the responsibility for loss or damage it is usual to convene a board, or designate a surveying officer, to investigate and fix the responsibility for the amount of damage or loss; and if there has been any criminal responsibility connected therewith, or it has resulted from neglect of duty, the court-martial on trial thereof may fix the pecuniary liability also.

**358. Reprimand.**—This sentence is usually awarded to officers only, and for minor offenses where a mild penalty is to be inflicted. It is not appropriate for enlisted men, in general, but is authorized[2] and may be awarded to first-class privates. The proper authority to administer the reprimand is the authority who approves the sentence, and he may vary in severity or mildness according to his views of the case.

**359. Dishonorable Discharge.**—This sentence is applicable to enlisted men only and must be awarded by a general court-martial. It operates, when executed, as a complete separation from his honorable status as a soldier of the Army; but he remains a military prisoner, subject to military jurisdiction, during the period of his confine-

[1] A. R. 1328, 1329. [2] Court-martial Manual, p. 49.

ment if any has been awarded him in a sentence which has been duly approved by the proper authority. It takes effect when he receives notice thereof, actual or constructive; actual delivery of the discharge paper itself is not necessary. Where confinement has been included in the sentence the certificate of discharge is held in custody of the post commander, or other proper officer, until the confinement is executed and is then delivered.

**360.** Dishonorable discharge is a discharge from the military service as a punishment,—a complete expulsion from the Army,—and closes all accounts and responsibilities, except under the provisions of the 60th Article of War, and if the person afterward fraudulently re-enlists he cannot be tried for an offense committed during a previous enlistment; even if he has deserted, the dishonorable discharge prevents trial therefor.[1] But an honorable discharge, or a discharge without honor, marks the termination of that contract of enlistment to which it relates only, and does not relieve the soldier from the consequences of a desertion committed during a prior enlistment; but it does discharge him from amenability for all offenses, including desertion, charged against him for that particular term of enlistment, except as provided in the 60th Article of War.[2]

**361.** When a soldier is convicted, on one arraignment, of two or more offenses, none of which is punishable, under the provisions of Article II of the Executive Order prescribing limits of punishment or by the custom of the service, with dishonorable discharge, but the aggregate term of confinement for which, as specified in said article, may exceed six months, dishonorable discharge with forfeiture of pay and allowances may be awarded in addition to the authorized confinement.[3]

[1] Dig. Op. J. A. G. 1167.
[2] Id. 1166.
[3] G. O. 96, War Dept. 1905, Article IV; G. O. 204, War Dept. 1908, Appendix D.

**362. Reduction to Ranks.**—Non-commissioned officers may be reduced to the ranks, but a non-commissioned officer not sentenced to reduction shall not be subject to confinement.[1] The sentence of reduction should always, therefore, precede that relating to confinement. A non-commissioned officer convicted of an offense not punishable with reduction may, upon proof of one previous conviction within the prescribed period, be sentenced to reduction in addition to punishment already authorized.[2]

**363. Reduction in Grade.**—First-class privates may be reduced to second-class privates in all cases where for like offenses on the part of non-commissioned officers their reduction in grade is now authorized.[3]

**364. Deprivation of Certificates of Eligibility for Appointment as Second Lieutenant.**—The rights and privileges of enlisted men arising from certificate of eligibility for promotion to second lieutenant in the Army may be vacated by the sentence of a general court-martial.[4]

**365. Substitution of Punishments.**—The Executive Order prescribing limits of punishment [5] provides (Article VII) for substitutions for punishments named in Article II of that order, at the discretion of the court, at fixed rates as follows:

Two days' confinement at hard labor may be substituted for one dollar of forfeiture, or the reverse; one day's solitary confinement on bread and water diet for two days' confinement at hard labor or for one dollar forfeiture.

**366. Punishment for Offense Committed while in Confinement after Discharge.**—All soldiers sentenced by court-martial to dishonorable discharge and confinement

[1] G. O. 96, War Dept. 1905, Article VII, G. O. 204, War Dept. 1908, Appendix D.
[2] Id., Article III, Sec. 6; G. O. 204, War Dept. 1908, Appendix D.
[3] Id., Article III, Sec. 7; G. O. 204, War Dept. 1908, Appendix D.
[4] A. R. 32.
[5] G. O. 96, War Dept. 1905; G. O. 204, War Dept. 1908, Appendix D.

remain, until discharged from such confinement, subject to the Articles of War and other laws relating to the administration of military justice.[1]

**367. Prohibited Punishments.**—"Excessive fines" and "cruel and unusual punishments" are forbidden by Article VIII, Amendments to the Constitution of the United States, and while this is binding upon the judicial system of the United States and not upon courts-martial, which are no part of the judicial system, yet such provisions are intended to preserve the personal rights and liberties of citizens living under the Constitution; and they should be observed, even though not binding, whenever not inconsistent with the preservation of discipline and the organization of the Army. Punishments which are cruel, unusual, or excessive in character should never be awarded by a court-martial under its discretionary powers, and if they should be, it would be the duty of the reviewing authority to set the sentence aside.

**368.** Certain punishments are specifically prohibited by the 98th Article of War, which provides that:

Article 98.—No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.[2]

**369.** Certain sentences and punishments are also prohibited by orders and regulations. Sentences imposing tours of guard duty are forbidden,[3] as are also punishments which require the carrying of a heavy log. Sentences to wear a ball and chain are not to be awarded except in extreme cases.[4]

But punishment by solitary confinement, or confinement upon a diet of bread and water, is recognized in the

[1] Act June 18, 1898.
[2] See post, par. 805.
[3] A. R. 973.
[4] Court-martial Manual, p. 50.

Executive Order of the President published June 12, 1905, and November 25, 1908, Article VII, which limits solitary confinement so that it "shall not exceed fourteen days at one time, nor be repeated until fourteen days have elapsed, and shall not exceed eighty-four days in one year."[1]

[1] G. O. 96, War Dept. 1905; G. O. 204, War Dept. 1908, Appendix D.

## CHAPTER XXII

### VOTING—RECOMMENDATION TO CLEMENCY

**370.** The Articles of War prescribe the method of voting in courts-martial as follows:

Article 95.—Members of a court-martial, in giving their votes, shall begin with the youngest in commission.

This requirement applies to all important questions requiring the decision of the court by vote, and is especially important in voting upon the finding and the sentence. It does not prescribe whether the voting shall be by ballot or *viva voce*, and in the majority of cases the latter form is used. The necessity for beginning with the youngest in commission is apparent from the fact that the junior members, being generally of less service and experience than their superiors in rank, might be unduly impressed by their vote, whereas justice to the accused requires entire freedom of opinion.

**371.** In all cases, except of the death penalty, which requires the concurrence of two-thirds of the members of a general court-martial,[1] a majority vote decides the question before the court.

**372. Voting upon Charges.**—In voting upon the charges and specifications the president of the court takes the vote by reading the first charge and its specifications, and, beginning with the first specification of that charge,

[1] Art. 96. See post, par. 803.

notes the vote of each member, beginning with the youngest in commission, and announces the result to the court; he then proceeds in like manner with the second specification and with each following specification, until there is a finding upon all, when he proceeds to take the vote in like manner upon the charge itself.

If there be more than one charge, each charge with its specifications is proceeded with in a similar manner until all have been voted upon.

**373.** Every member, being duly sworn to "try and determine" the matter before the court, must vote; there is no authority that can excuse a member from voting upon every question requiring determination by the court.

**374. Voting upon the Sentence.**—The fact that a minority has voted "not guilty" upon the charge and specification will not excuse them, in any case of discretionary punishment, from voting upon a sentence; in which case the majority vote also determines it.

**375.** Where the death penalty is mandatory upon the finding of "guilty," as in the 57th Article of War, writers seem to differ on the question as to whether if a majority has voted "guilty" this is conclusive upon the other members of the court and they must vote the sentence required by law.

It would seem, in such cases, and it is so held by some writers, that, the sentence being mandatory upon the finding, the latter carries with it the sentence, and therefore the finding of "guilty" should itself be by a two-thirds vote of the members of the court.

This appears to be the just and proper view of the question, for there would be no need for the law requiring the two-thirds vote if, in cases of persons convicted of an offense where the mandatory and only punishment is death, the finding of "guilty" by a majority alone could *compel* the sentence. The law was intended for the pro-

tection of the prisoner and should be liberally construed in his favor rather than against him.

**376. Tie Vote.**—In the proceedings of deliberative bodies whenever there is a tie vote the affirmative proposition is lost. So in courts-martial, if there is a tie vote on the finding, the question being "is he guilty," the result is in favor of the accused and it is recorded as "not guilty." In a similar manner in a vote upon the sentence a tie vote means that the sentence is lost. The accused is, however, always entitled to the benefit of equal division of opinion, and as the vote has been upon a sentence supposedly milder than the one to follow, it is proper to reconsider such a vote, and, generally, reconsideration will produce a majority in favor of, or opposed to, the sentence. A tie vote on a motion or on any objection is a vote in the negative, and the motion or objection is not sustained.

**377. Vote, How Recorded.**—In every case the result of the vote is recorded as the action of the court, and no protest or difference of opinion is permitted to appear in the proceedings which would tend to disclose the vote or opinion of any member.

**378. Recommendation to Clemency.**—The sentence appropriate to the offense having been awarded in any case, one or more members of the court may feel that circumstances connected with it, as developed by the evidence, may justify clemency on the part of the reviewing officer, and a less severe punishment than that awarded by the court.

In such circumstances a recommendation to clemency may be submitted to the reviewing authority signed by all the members of the court desiring to join in such recommendation, and it will be forwarded with the record, but not as a part thereof, though it should be appended thereto after the exhibits referred to in the proceedings.

No such recommendation should be made, however, without good reason therefor, nor without careful consideration, and the grounds upon which it is based should be stated; such as, previous good character of the accused, long and faithful service, absence of deliberate criminal intent, or the long period he has already been in confinement before trial, etc.

## CHAPTER XXIII

### THE RECORD

**379.** Courts-martial being courts of inferior and limited jurisdiction, it must be made to appear clearly and affirmatively, in order to give effect to their judgments, that the court was legally constituted, that it had jurisdiction of the person and the offense charged, that the judgment imposed was conformable to law,[1] and that the statutory rules with regard to jurisdiction have been complied with.

**380.** The record of a court-martial, in any case, is the complete history of the composition, organization, and the proceedings of the court in that case. It must state the facts which give the court jurisdiction. It must appear therein that the court was legally organized, was composed of members eligible to sit upon it, that it had jurisdiction over the person of the accused, and of the offense with which he is charged, and that its proceedings have been conducted in accordance with the laws, orders, customs of the service, and regulations governing its procedure. Any lack of jurisdiction will render its judgments void, and violations of the requirements of law will constitute a fatal defect; while failure to comply with orders, customs, and regulations governing its procedure may cause its proceedings to be wholly or partly disapproved,

[1] Hamilton v. McClaughry, 136 Fed. Rep. 445.

and the judgment of the court modified or wholly annulled by the reviewing authority.

**381.** To enable the reviewing authority, whose approval is necessary to give life and force to the judgment of the court, to act advisedly upon the proceedings, the record thereof must be full and complete. It is required that every court-martial shall keep a complete and accurate record of its proceedings, which will be authenticated, in each case, by the signatures of the president and judge-advocate. In case of the death or disability of the judge-advocate after the court has decided on the sentence, and the record cannot be authenticated by his signature, it must show that it has been formally approved by the court and must be authenticated by the signature of the president. The judge-advocate should also affix his signature to each day's proceedings.[1]

If the death or disability of the judge-advocate occurs during the trial of a case the fact is reported to the convening authority, and proceedings are suspended until another judge-advocate is appointed or a new court ordered.

If the president of a court-martial should die or be disabled, the next senior in rank takes his place, and though any member be lost through any cause, so long as a quorum remains the trial should be proceeded with. The proceedings will be signed by that member of the court who is president at the conclusion of the trial.

**382.** The record is usually written in black ink, but may be written on the typewriter using the copyable ribbon when practicable.[2]

The finding and sentence should be entered on the record by the judge-advocate himself, and in his own handwriting rather than by typewriting.[3]

[1] A. R. 988. [2] A. R. 989.

[3] If by typewriting, he will insert, immediately after the authentication of the record, "I certify that I recorded the findings and sentence of the court. —— ——
*Judge-Advocate,*" (Cir. 10. War Dept. 1908.)

383. The record of each case being required to be separate and complete, it must show that the court was sworn for the trial of that particular case. It is not a compliance with law to swear the court at its organization for the trial of such cases as have been, or may be, referred to it, even if all the accused are present in the room, and the members are not objected to; the oath must be administered in each case in its turn as it comes before the court, after the accused has had his opportunity to challenge the members.

384. The proceedings are headed "Proceedings of a general court-martial convened at Fort ———, pursuant to the following order: (Headquarters Department ———, Special Orders No. ———, etc.)"

The order is then inserted in full upon the record and it must appear therefrom that it was issued by an officer competent to convene such court-martial, and that its members are eligible to sit upon the court for the trial of that case. The number of members, and their relative rank with reference to the accused, is, however, determined by the convening authority, his decision being conclusive, and he also names the judge-advocate.

If there has been any modification of this order such later orders or modifications are also then read and entered upon the record.

385. **Date and Place of Meeting; Members Present.**— The date and place of meeting with the names and rank of the members present and of the judge-advocate, and of those members absent, with cause of absence, if known, are then recorded, together with any preliminary business necessary to be transacted in connection with the case. The order, or a certified copy thereof, authorizing the absence of a member, if any be received, is then inserted, or it may be appended and referred to by its number, headquarters whence issued, date, etc., the reference showing that it is so appended and giving its proper

reference mark. If the absence is caused by sickness, a surgeon's certificate should be furnished by the absent member and be appended.

**386. Changes in Membership of Court.**—If there be any change made in the membership of a court-martial during the period of trial of any case, the fact of such change, and a copy of the order or orders making it, are entered in full on the record. If a new member be added it must show that the accused had opportunity to object to him, and, if admitted to membership, that he was duly sworn, and that the record made preceding the time of his taking his seat was read to him that he might have knowledge of the case so far as it had proceeded without him.

**387. Introduction of the Accused; Challenges.**—The order convening the court, and modifications thereof, being entered the record then shows the introduction of the accused whose trial is to be proceeded with, that he, and his counsel, if he has one, are present before the court and that the order convening the court is read to him, and that he has an opportunity to object to trial by any of the members present.

**388.** The accused, if he challenge at all, must challenge but one member at a time, and the challenge must be "for cause stated."

The ground of challenge will be entered upon the record, together with the reply of the challenged member, if he make any, or his statement under *voir dire* if he be examined thereunder. If the accused requests that the member be placed upon his *voir dire* the judge-advocate swears him, the record stating that he was then duly sworn by the judge-advocate and testified as follows: (All questions asked and answers thereto being recorded as given by him.)

The oath administered to the challenged member is as follows: "You swear that you will true answers make to

questions touching your competency as a member of the court in this case. So help you God."

**389.** His statement being accepted, or the examination under *voir dire* being concluded in any case, the record shows that the court was then closed, the challenged member, the accused, his counsel, and the judge-advocate withdrawing; and, upon re-opening, that they were recalled and the president announced the decision of the court, stating it so that it may be recorded. If the objection was sustained the record shows that the member then withdrew from the court.

The record must also show that after all the challenges have been acted upon there still remains a quorum of at least five members for the trial of the case.

**390. Swearing the Members and the Judge-Advocate.**—All challenges having been decided, and a quorum remaining, the record must show that the members of the court and the judge-advocate were then duly sworn, in the presence of the accused.[1]

**391. Arraignment; Pleas.**—The record must then show that the accused was duly arraigned upon the charges and specifications,[2] a copy thereof being entered in full in the body of the record.

**392.** If there be any special plea, as in bar of trial, etc.,[3] made by the accused, it will be at this time, and it, and all statements and actions taken under it, must be recorded together with the final determination of the matter by the court.

**393.** These pleas being disposed of, or not being made, the plea to the general issue is in order, and such pleas are recorded consecutively as follows:

To the 1st specification, 1st charge, ———,
To the 2d " " ———,

[1] See ante, par. 174.
[2] See Arraignment, ante, par. 177.
[3] See Pleas, Chapter XIV.

and so on to all the specifications which follow in their numbered order, and then:

To the 1st charge, ———,
To the 1st specification 2d charge, ———,
To the 2d " " ———,

and after all specifications thereof are pleaded to,

To the 2d charge, ———.

If there are other charges and specifications, the pleas are recorded in like manner. Whatever plea is made to any specification or charge is entered fully upon the record, the accused being entitled to except words or phrases, to substitute other words therefor, and to plead guilty to part, and not guilty to other parts, of any charge or specification.

This arraignment is always made immediately after the court and the judge-advocate are sworn, and is so recorded; if made before the taking of the oath by the court and the judge-advocate, it would be invalid and without effect.

**394. Testimony.**—All testimony must be recorded in full, and in the very words of the witness. The questions as well as the answers thereto are entered upon the record.

**395.** The record must show that the witness introduced, for prosecution or defense, was duly sworn.[1]

**396.** The first question asked and recorded is as to the name, rank, and station of the witness himself, and the next question is whether he knows the accused, and, if he does, his answer should identify him, by his name, rank, and station.

**397.** The questions of the judge-advocate are recorded as "question by the judge-advocate," the answers simply as "answer." Questions and answers then follow in order and are recorded until the close of the direct examination, when, the judge-advocate having finished, the accused

[1] For oath and form of administration thereof, see ante, par. 238–239.

is entitled to cross-examine the witness, and this is headed "cross-examination," and the questions asked are recorded as "question by the accused," whether asked personally by him or by his counsel for him.

If the accused does not desire to cross-examine, the record states that "the accused declined to cross-examine the witness."

Similar proceedings are recorded in the case of every witness introduced.

If the testimony of the witness is read over to him at his request or by direction of the court, that fact and the corrections made, if any, should be stated, referring to the original testimony which remains on the record as taken.

When the judge-advocate has closed his prosecution, he so announces, the record stating that the "judge-advocate then announced that the prosecution here rested."

**398.** Witnesses introduced for the defense are sworn, as for the prosecution, by the judge-advocate, and the first questions recorded are those by the judge-advocate, as to the name, rank, and station of the witness and of the accused, in order to establish their identity. The questions for the defense following are recorded as "question by the accused," and on the cross-examination "question by judge-advocate." If the latter does not cross-examine, it should be stated "the judge-advocate declined to cross-examine the witness."

**399.** If the accused testifies as a witness in his own behalf, it is essential that the record show that "it was at his own request." [1]

**400.** Objections may be made to questions, or to answers thereto, and any interlocutory matter upon which the court acts during the trial must be fully recorded, with the action of the court thereon, in its proper place in the proceedings.

[1] See ante, par. 262 et seq.

If any question or answer is objected to by either party, the objection and the grounds therefor must be stated, with the reply thereto, if any, and both, with the action of the court, must be entered upon the record. If the court has been closed for deliberation on the subject, the record so states, and that the judge-advocate, the accused, and his counsel withdrew, and that on the re-opening of the court the president announced its decision, which decision is then entered upon the record.

**401.** If a question is asked by a member and objected to by another member, or by the judge-advocate or the accused, and the objection is sustained by the court, it is not answered and is recorded as "question by a member"; but if the objection made is not sustained, the question is repeated by the judge-advocate and recorded as "question by the court." Any question which *the court* decides to ask is not open to objection from any source, and must be answered.

**402. Statement.**—The accused having no further evidence to offer so states, and the fact is entered upon the record. He may then make a verbal statement, which must be entered upon the record as made, or submit a written statement which is read to the court. If he submits a written statement, as is usual, it should be signed, but not sworn to, by the accused and will be appended to the proceedings, the record stating that "the accused then submitted a written statement in his defense which was read to the court and is hereto appended marked 'A,' 'B,' or 'C,' " etc.

**403.** All documents or papers submitted to and received by the court and forming part of its proceedings are attached thereto as appendices, each marked, in the order of its reception, as Exhibit "A," "B," or "C," etc., and reference is made to them, according thereto, in the body of the record as above. The papers received with

the charges and submitted to the court, or copies thereof, are appended to the proceedings; all others, received but not submitted to the court, are returned with the charges, which also enclose the record of the court, the endorsement of the judge-advocate being made upon the charges that they have been duly tried and that the record of the trial is enclosed therewith.

Documents submitted and not received, as being irrelevant or unimportant in connection with the case, are referred to in the record by simply stating their character and the grounds of their rejection, and are not required to be attached to the record.

**404. Reply of the Judge-Advocate.**—If the judge-advocate submits the case without any remarks or reply to the statement of the accused, the record so states. But if he sums up the case for the prosecution, as he is entitled to do, his remarks, if verbal, must be entered upon the record in full, or, if written and read by him, it is stated that the judge-advocate submitted (in writing) and read to the court his reply, or remarks upon the case, which is appended, marked "B" or "C," etc.

**405. Finding.**—There being nothing further submitted by either party, and the court desiring no further evidence in the case, the record must show that the judge-advocate, the accused, and his counsel then withdrew and the court was closed, and finds the accused, naming him and his rank exactly as stated in the charges and specifications:

Of the 1st specification, 1st charge, ———,
Of the 2d " " ———,

and so for each succeeding specification.

Of the 1st charge, ———.

Similar record is made for each of the succeeding charges in their regular order.

**406. Previous Convictions.**—If the accused, being an enlisted man, has been found guilty and the case is one where the punishment is left to the discretion of the court-martial under the Articles of War, and the provisions of the Executive Order establishing limits of punishment are applicable, the record must then show that the judge-advocate and the accused were thereupon recalled, the court opened, and that the judge-advocate stated that he had no evidence of previous convictions to submit, or, if he has received any, that the judge-advocate then read the evidence of previous convictions, copies of the records of which are appended to the proceedings marked Exhibit "C," "D," etc.

The court is then again cleared and closed, and proceeds to vote upon the sentence, which being determined, the record then states that the judge-advocate was thereupon recalled, and the court at such an hour proceeded to other business, or adjourned to a certain date and hour, or to meet at the call of the president, or, if all work is completed, that it adjourned *sine die*.

**407. Sentence.**—If the punishment is not discretionary, or the accused is found not guilty, or, in the case of an officer or cadet, the court is not re-opened to receive evidence of previous convictions, but proceeds directly to the sentence or acquittal, the sentence stating that the court does therefore sentence him—stating the name, rank, etc., of the accused precisely as given in the finding—to whatever sentence accords with the offense as prescribed by law and orders.[1] If the sentence is "death," the record must explicitly state that two-thirds of the members concurred therein.[2]

If the accused is found not guilty, the record shows, after the finding, that the court does, therefore, acquit

[1] See Sentence and Punishment, Chapter XX, and Forms for Sentences, Appendix E, 10.

[2] Court-martial Manual, p. 61.

him, stating the name, rank, etc., precisely as in the finding.

**408.** When the sentence is determined upon, the judge-advocate is then recalled, without the presence of the accused at this time, simply for the purpose of informing him of the sentence and enabling him to prepare the record; it would be illegal and improper for him to be before the court, in the absence of the accused, during its consideration of the case.

**409. Authentication of Record.**—The complete record when written out is authenticated by the signatures of the president and the judge-advocate.[1] But the court, as a whole, is responsible for the record, and it should be read to and approved by the court before the president and judge-advocate sign it. At least two blank pages will be left after the adjournment and before the appendices for the action of the reviewing authority.

**410. Recommendation to Clemency.**—Members signing a recommendation to clemency [2] transfer the same to the judge-advocate to be appended to the proceedings for transmittal to the reviewing authority. The original charges, statement of service, and other papers forwarded with the original charges, not attached to the proceedings, are forwarded with the record which the judge-advocate must transmit without delay to the officer having authority to confirm the sentence.[3]

**411. Adjournment.**—The record being completed and approved by the court it states that, at such an hour, the court proceeded to other business, or adjourned to meet at a certain date and hour, or to meet at the call of the president. If it has no more business to transact, the court adjourns *sine die.* This being entered, the entire record is authenticated by the signatures of the president and the judge-advocate.

[1] See ante, par. 381. [2] See ante, par. 378. [3] A. R. 990.

**Adjournments from Day to Day.**—Adjournments from day to day, during the trial of a case, are signed by the judge-advocate. After such adjournment it is not necessary to enter, on re-convening, the names and rank of each member, the judge-advocate, etc. As the record at the organization of the court shows the names and rank of the members and judge-advocate, it only need be stated during the remainder of the trial, after such adjournments, that all the members, the judge-advocate, the accused, his counsel, and the reporter, if any, were present.

If any member is absent, whose absence is not already accounted for, the record here shows the fact of his absence and the authority therefor, if known.

**Recess.**—After a recess, which is noted on the record, it should be stated that the members of the court, the judge-advocate, the accused, his counsel, and the reporter, resumed their seats.

**412. Forwarding Records of General Court-martial.**—The entire record, when completed and authenticated, is promptly forwarded by the judge-advocate to the convening authority, as an enclosure to his endorsement upon the charges, stating that they have been duly tried and that the record of the trial is enclosed therewith.

The proceedings of every general court-martial, together with the accompanying papers, are transmitted to the officer having authority to confirm the sentence,[1] and when acted upon by him they must be forwarded, with such expedition as circumstances will permit, to the Judge-Advocate-General of the Army, in whose office they are to be carefully preserved.[2] Proceedings of courts-martial convened by the President are forwarded direct to the Secretary of War. Every party tried by a general court-martial, upon demand therefor made by himself or by any person in his behalf, is entitled to a copy

[1] A. R. 990. [2] Article 113.

of the proceedings and sentence of such court.[1] Application for copies under this Article should be addressed to the Judge-Advocate-General.

**413. Forwarding Records of the Inferior Courts.**—The complete proceedings of a garrison or regimental court (except at places exempted from their jurisdiction, where such records are forwarded to The Adjutant General of the Army), will, after action of the post or regimental commander thereon, be forwarded to department headquarters.[2] These may be destroyed at the end of two years after receipt.[3] The summary court record is kept at each military post and in the field, at the headquarters of the proper command, and the commanding officer makes a monthly report to the department headquarters of the cases tried.[4]

**414. Lost Record.**—Where the record of a court-martial has been lost before the action of the reviewing authority thereon, the proceedings are thus terminated, unless the court can be re-convened and a new record made from extant original notes. But where they are lost after the action of the reviewing authority, the sentence having been confirmed and ordered executed, the loss does not impair or affect the judgment of the court, and constitutes no legal obstacle to the enforcement of the penalty.[5]

### REVISION PROCEEDINGS

**415.** The record, having been received by him, may be found by the reviewing authority to have some defect, either in omission to record some material fact necessary to insure the validity of its judgment, or, in his opinion, the finding may not be that justified by the evidence, or the sentence be inadequate as a punishment for the offense

[1] Article 114.
[2] A. R. 991.
[3] Act March 3, 1877.
[4] Act June 18, 1898; see Appendix E, 6.
[5] Dig. Op. J. A. G., par. 2139.

of which the accused is found guilty, or not in accordance with law, orders, or regulations.

The reviewing officer, in such case, has no power or authority to correct the record; but when the record of a court exhibits error in preparation, or seemingly erroneous conclusions, the reviewing authority may re-convene the court for a re-consideration of its action, pointing out defects.[1] In the order or endorsement re-convening the court the reviewing authority designates the errors and defects to be corrected, stating his views with respect thereto, and sends the proceedings, with his remarks, to the president of the court, who informs the judge-advocate and directs him to notify the members that the court will re-convene at a date fixed by him, which should be as early as practicable. If the omission is such as to make his presence necessary, as in the correction of a special plea of the accused, or of an objection taken by him, the accused is also notified and required to be present with his counsel if he desires him.

As many of the errors or omissions are purely clerical and as the correction may relate to the finding or sentence which is considered in closed court, the presence of the accused is not generally necessary or advisable, but when any possible injustice may result from his absence he should be required to be present.

**416.** The record of the re-convening of the court and its revision proceedings is made separate and distinct from the original record. It contains the date and place of meeting and a copy of the order or endorsement pursuant to which it is re-convened and the names of all the members present, and of those absent, who sat on the trial, with cause of absence, if known. It must also show that the judge-advocate was present.

There must be at least five members present of those

[1] A. R. 992.

who acted upon the trial, together with the judge-advocate. If the finding and sentence are to be revised, all who voted thereon ought, if possible, to be present on revision. Five members who acted on the trial will constitute a legal quorum and their final action will be the action of the court,[1] but the whole court should be present if possible.[2]

There being a quorum present, the judge-advocate reads the order or endorsement re-convening the court and, if the court is closed, withdraws. Whenever the court is closed, after due deliberation it is re-opened, the judge-advocate recalled, and the president of the court announces its action which, if it affects the finding or sentence, may be that it respectfully adheres to its former finding or sentence, or both, or it revokes the former finding and finds the accused as follows: (the new finding being here inserted); or it may state that it revokes its former sentence and sentences the accused as follows: (the sentence being here inserted); or if it is a simple amendment to the record it is stated that the court amends the record as follows: (the amendment being here inserted with reference to the page and line of the original record).

**417.** The omission corrected must be one in fact, a failure to record an actual event in the original proceedings. An omission or irregularity of proceeding, such as failure to afford the accused the opportunity to challenge the members of the court, or the omission to swear the court or judge-advocate, or to receive the pleas of the accused, or to swear a witness, cannot be repaired by any subsequent revision.

The original record must remain just as it was when forwarded to the reviewing authority, no interlineations or erasures are to be made in it by the president, the judge-

[1] Dig. Op. J. A. G. 2251; 7 Op. Attorney-General 338.
[2] See Benét, ed. 1868, p. 174; Simmons, Sec. 723.

advocate, by the court itself, or by any member thereof; any such act would constitute a grave irregularity.

**418.** In its revision of the record, should the court concur in the views submitted, it will proceed by amendment to correct its error, and may modify or completely change its findings, when necessary, to accord with such correction. It cannot, however, re-open the case by calling or re-calling witnesses, as such action would be illegal.[1] The record of revision will be appended to the original proceedings, following them immediately, before the exhibits.[2]

**419.** There is no limit to the number of times that the record may be returned to the court for revision and the court re-convened, but the proposed correction is wholly within the discretion of the court; the reviewing authority cannot compel the court to make the correction nor dictate its action.[3]

If the court has been dissolved, it is no longer in existence as a court and cannot be re-convened. Correction or modification of its record will, therefore, be impossible in such cases.

**420. Record of Garrison and Regimental Courts-martial.**—The form of record of the garrison and regimental court-martial is similar to that of the general court-martial except that "testimony taken before regimental or garrison courts-martial will not be reduced to writing." [4]

**421. Record of Summary Court.**—Forms for the summary court record,[5] and for the monthly report of cases tried, are furnished from the War Department by the Adjutant General of the Army.

[1] A. R. 992.
[2] See Appendix E, 4.
[3] Dig. Op. J. A. G. 2250.
[4] A. R. 988.
[5] See Appendix E, 5, 6.

## DISPOSITION OF RECORDS [1]

**422.** The Judge-Advocate-General revises and is the custodian of the records of the proceedings of all general courts-martial, courts of inquiry, and military commissions.[2] The original records of proceedings, with the decisions and orders of the reviewing authorities made thereon, and also the records of proceedings of all general courts which require confirmation by the President but which have not been appointed by him, will be forwarded direct to the Judge-Advocate-General. One copy of the order promulgating the action of the court, and a copy of every subsequent order affecting the case, will be forwarded to the Judge-Advocate-General, with the record of each case. When more than one case is embraced in a single order, a sufficient number of copies will be forwarded to enable one to be filed with each record. The proceedings of all courts and military commissions appointed by the President will be sent direct to the Secretary of War.[3]

**423.** "Applications of officers, enlisted men, and military prisoners for copies of proceedings of general courts-martial, to be furnished them under the 114th Article of War, will, when received by post or other commanders, be forwarded direct to the Judge-Advocate-General." [4]

**424.** "Communications relating to proceedings of military courts on file in the Judge-Advocate-General's Department will be addressed and forwarded direct by department commanders to the Judge-Advocate-General. In routine matters the Judge-Advocate-General and judge-advocates may correspond with each other direct." [5]

[1] Court-martial Manual, p. 74.
[2] Sec. 1199, R. S.; A. R. 923.
[3] A. R. 925.
[4] Id. 927.
[5] Id. 928.

**425.** Judge-advocates of departments are the custodians of the reports of cases tried by summary courts [1] and of all proceedings of garrison or regimental courts-martial.[2]

**426.** Post commanders will, on the last day of each month, make a report to the department headquarters of the number of cases determined by summary court during the month, setting forth the offenses committed and the penalties awarded.[3] "The complete proceedings of a garrison or regimental court, convened within the jurisdiction of a department commander, will be transmitted, without delay, by the post or regimental commander to department headquarters."[4]

**427.** The reports of cases tried by summary courts and records of other inferior courts convened at places within his jurisdiction will be filed in the office of the judge-advocate at the headquarters of the department commander in whose department the courts were held, the records of garrison and regimental courts to be retained for two years, at the end of which time they may be destroyed;[5] the summary court reports may be destroyed "when no longer of use."[6]

Where garrison or regimental courts are convened at places exempted from the jurisdiction of a division or department commander, the reports and records thereof will be forwarded directly to the Adjutant General of the Army.[4]

[1] Act of June 18, 1898, establishing the summary court. See Appendix B.
[2] Act of March 3, 1877 (19 Stat. at Large, 310).
[3] Act of June 18, 1898, Sec. 4. See Appendix B.
[4] A. R. 991.
[5] Act of March 3, 1877 (19 Stat. at Large, 310).
[6] Act of June 18, 1898.

## CHAPTER XXIV

### THE REVIEWING AUTHORITY[1]

**428.** The proceedings of a court-martial as signed by the president and judge-advocate thereof are not final; its sentence cannot be enforced until approved by the proper reviewing authority, such action being provided for by the following article of war:

Article 104.—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being.

It is also required, by A. R. 990, that the officer having authority to confirm the sentence will state at the end of the proceedings in each case his decision and orders. For this purpose the judge-advocate leaves at least two blank pages in the proceedings, immediately following the record of adjournment.

The Article quoted above limits approval to "the officer ordering the court" or "the officer commanding for the time being." The officers authorized to order general courts-martial are designated by the Articles of War,[2] and, in special case, for the trial of cadets at the Military Academy, by Sec. 1326, Revised Statutes United States. Those who may convene regimental and garrison courts,

[1] See Sentence and Punishment, ante, par. 310 et seq.; and Pardon or Mitigation of Punishment, post, par. 446 et seq., and post, par. 811.
[2] Articles 72 and 73. See post, par. 779, 780.

and the summary court, are designated by the 81st and 82d Articles of War and by the Summary Court Act, approved June 18, 1898.[1] The rank of those who may convene general courts-martial is stated in Article 72 as "any general officer commanding an army, a territorial division, or a department, or colonel commanding a separate department," so that an officer of lower rank cannot convene such courts under that Article. The rank of "the officer commanding for the time being" not being fixed, an officer of lower rank than colonel may, "if in command for the time being" in the virtue of the 122d Article of War, approve the sentence of a court-martial legally constituted by his predecessor in command, but he is not authorized, under the 112th Article of War, to exercise the power of mitigation in such cases.[2]

**429.** The Army Regulations now provide that in the event of the death, or disability, of the permanent commander of a territorial division or department, or his temporary absence from the limits of his command, the senior line officer present and on duty therein will exercise the command of the division or department, unless otherwise ordered, until relieved by proper authority. Yet an absent division or department commander may continue to discharge the more important functions of his command, but his exercise of command and his absence therefrom will in such case require the sanction of higher authority.[3]

**430.** The 73d Article of War authorizes the commander of a division or a separate brigade, in time of war, to appoint general courts-martial. The commander of a division under our organization is properly a major-general, and the commander of a brigade a brigadier-general, but an officer of less rank may become by virtue of seniority, or assignment, the commander of a division or brigade,

[1] See Military Tribunals, ante, Chapter III.
[2] Op. J. A. G., July 29 and Aug. 11, 1908 (No. 16710). [3] A. R. 193.

and, as such, empowered, under this Article, to appoint general courts-martial and, under Article 104, will have authority to approve the sentence of such court.[1]

**431.** Where a department has been merged into another, or into a division, the commander of the new department or division will be "the officer in command for the time being" and empowered to act upon the proceedings and sentence of a court-martial previously convened by the commander of the former department now within the limits of his command. And where a post has been abandoned the department commander will act upon the proceedings of inferior courts duly convened prior thereto and requiring approval.

This Article (104) limits the act of approval to the persons indicated in it, and they cannot delegate their power. A staff officer cannot, therefore, act in the name or by the authority of the officer ordering the court, or "officer commanding for the time being."

**432.** The approval indicated in the Article refers to the sentence alone, and it is not necessary in order to carry the sentence into effect that the reviewing officer approve the whole proceedings; he may in fact disapprove certain parts thereof and yet approve the sentence; he may approve some findings and disapprove others in the same case.[2] Whenever, however, he deems the proceedings erroneous in any material particulars, or ill-advised, he may re-convene the court for correction of the defect. If he regards the sentence as inadequate he may not add to the punishment imposed, but he may re-assemble the court for revision thereof, stating why he considers it inadequate.[3]

**433.** The action of the reviewing authority is necessary to give life to the sentence, so that in cases where the

[1] See Winthrop, Vol. 1, p. 77.
[2] Carter v. McClaughry, 183 U. S. 365, 384.
[3] Dig. Op. J. A. G. 2230, 2231.

Articles of War [1] provide that the sentence shall not be carried into effect until confirmed by a superior authority, if the sentence is disapproved by the immediate reviewing authority, it is without effect, being nullified in law by that act, and, there being nothing for the superior authority to act upon, it is not necessary for the record to be transmitted to him for his action.[2]

**434.** The action of the reviewing authority upon the sentence is either of approval or disapproval, and this may be stated without comment or he may make such remarks in connection therewith as he believes justified by the facts in the case as shown by the record; but it is not necessary that he should give any reason for his action either in approval or disapproval. He must, however, endorse his action, with the date thereof, on the proceedings, at the end thereof, so that it becomes a part of the final record, and must sign such action in his own handwriting as being the proper reviewing authority.

The date is important as indicating the time when the sentence becomes effective, and the order promulgating the proceedings will, when practicable, bear the same date as the action of the reviewing authority. When this is not practicable, the order will give the date of the action of the reviewing authority as the date of the beginning of the sentence. This does not, however, apply to sentences of forfeiture of all pay and allowances; [3] nor to a dishonorable discharge, which becomes effective, and is dated, the day on which the order is received at the place where it is to be executed; [4] nor to sentences of dismissal of officers, which are usually made to take effect at some date, after approval thereof, designated by the President or Secretary of War. The forfeiture of all pay and allowances due an

[1] Articles 105, 106, 107, 108, 109.
[2] Dig. Op. J. A. G. 2229.
[3] A. R. 979.
[4] Dig. Op. J. A. G. 1155.

accused refers to all that is due on the date on which the sentence takes effect and which has accumulated prior thereto.

435. Trials by general courts-martial, including so much of the proceedings as will give the charges and specifications, the pleadings, findings, and sentence, and the action and remarks of the reviewing authority are announced in general orders issued from the War Department or from the proper division or department headquarters.[1]

436. **Execution of the Sentence.**—Authority for the execution of sentences is given in the 109th Article of War, which provides as follows:

Article 109.—All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court, or by the officer commanding for the time being, where confirmation by the President or by the commanding general in the field, or commander of the department, is not required by these articles.[2]

The cases in which confirmation by superior authority is required are stated in the 105th, 106th, 107th, and 108th Articles of War.[3] In Articles 105, 106, and 108, no sentence of death, with the exception of those "in time of war," no sentence of dismissal of an officer in time of peace, and no sentence respecting a general officer either in time of peace or war, can be carried into execution until confirmed by the President.

437. Article 105.—No sentence of a court-martial, inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerrilla marauders, convicted in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death

[1] A. R. 993. [2] See post, par. 816. [3] See post, p. 812–815.

may be carried into execution upon confirmation by the commanding general in the field, or the commander of the department, as the case may be.

This Article permits the execution of the sentence of death in the above cases, when war is being carried on, by either the general commanding in the field, or by a department commander engaged in carrying on war with the troops in his department. But, in time of peace, proceedings which involve death, or dismissal of an officer, must, after being approved by the convening authority, be forwarded by him direct to the Judge-Advocate-General for the action of the President.[1]

**438.** Article 106.—In time of peace no sentence of a court-martial, directing the dismissal of an officer, shall be carried into execution, until it shall have been confirmed by the President.

"This Article does not expressly require that the confirmation of the sentence shall be signed by the President, nor does it prescribe any form in which the confirmation shall be declared. A written approval, therefore, of a sentence of dismissal authenticated by the signature of the Secretary of War, or expressed to be by his order, is a sufficient confirmation within the Article; the case being deemed to be governed by the well-established principle that where, to give effect to an executive proceeding, the personal signature of the President is not made essential by law, that of the head of the department to which the subject belongs shall be sufficient for the purpose; the assent of the President to his order or direction being presumed, and his act being deemed in law the act of the President whom he represents." [2]

[1] Court-martial Manual, p. 65; Articles 105, 106, 108, post, par. 812, 813, 815.

[2] Davis' Military Law, p. 545; U. S. v. Fletcher, 148 U. S. 84; U. S. v. Page, 137 U. S. 673; Dig. Op. J. A. G. 337, and note.

**439.** Article 108.—No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer, shall be carried into execution until it shall have been confirmed by the President.

This Article applies to all sentences of any kind or character respecting a general officer, who is thereby assured of an examination of his case by the highest military authority in the land before the sentence can be carried into execution. The President's action under it, though judicial, need not be evidenced under his own hand.[1]

**440.** The articles that require action of superior authority other than that of the President are Articles 105 and 107.

The 105th Article of War, which has been inserted above, provides that in case of persons convicted, in time of war, of the crimes enumerated therein, the sentence of death, approved by the immediate reviewing authority, must be confirmed by the commanding general in the field, or the commander of the department, as the case may be.

If the war is being carried on within the limits of an organized department, and there is an organized division or separate brigade acting therein, under his command, the action of the commander of such division or separate brigade approving the sentence of death must, in the cases indicated in this Article, receive the confirmation of the department commander before being executed.

**441.** Article 107.—No sentence of a court-martial appointed by the commander of a division or of a separate brigade of troops, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the general commanding the army in the field to which the division or brigade belongs.[2]

[1] U. S. v. Page, 137 U. S. 673, 678, 680; U. S. v. Fletcher, 148 U. S. 84, 89. See post, par. 815.

[2] See post, par. 814.

This Article also refers to the organization of troops into divisions and brigades in time of war, under a general commanding the army in the field, and requires the sentence of dismissal of an officer, which has been approved by the commander of a division or of a separate brigade under his command, to be confirmed by him.

**442. Sentences of Courts-martial for Trial of Cadets.**—All legal sentences of a court-martial convened by the Superintendent of the United States Military Academy for the trial of cadets may be executed by him except those of dismissal or suspension, which must receive the approval of the President before being carried into execution.[1]

AUTHORITY FOR THE EXECUTION OF SENTENCES

**443.** The reviewing authority may pardon or mitigate the sentence of a court-martial,[2] but he has no power to commute the sentence, or to change the character or species of the punishment imposed, or to increase it. If, however, the sentence of the court is in excess of what the law allows, he may approve so much of it as is within the legal limits, and that part may be executed, the excess being null and void.

Sentence to imprisonment in a penitentiary, if legally adjudged, may be changed by him to imprisonment in a military prison, this being considered as a mitigation and not a commutation of the punishment awarded.

An unexecuted sentence, or any part thereof remaining unexecuted, may be remitted or mitigated; but an executed sentence is beyond the power of remission or mitigation.

**444.** It is not necessary for the reviewing authority to give reasons for his action upon the sentence; but where

[1] Sec. 1326, Revised Statutes.
[2] Art. 112; Sec. 3, Act June 18, 1898.

he disapproves it, it is usual for him to do so; and in all cases where he returns the proceedings to the court for revision he states the reasons therefor, for the consideration of the court. It is not necessary for his disapproval that the proceedings show facts making the trial illegal; he may disapprove them for any irregularity which, in his judgment, has prevented justice being done to the accused, or to the prosecution; and his action cannot be reversed by orders from any higher authority. If the sentence, as approved by him, is unwarranted or excessive, it may be mitigated or remitted, or even set aside if void for any cause, by the proper higher authority. Separate sentences, approved the same day, are cumulative, and operate and are to be executed consecutively.[1]

**445. Suspension of Sentences.**—Provision has been made for the suspension of the execution of the sentence of death, or of dismissal of an officer, by the authority having power to carry it into execution, by the following Article of War:

Article 111.—Any officer who has authority to carry into execution the sentence of death, or of dismissal of an officer, may suspend the same until the pleasure of the President shall be known; and, in such case, he shall immediately transmit to the President a copy of the order of suspension, together with a copy of the proceedings of the court.[2]

This Article refers to cases arising "in time of war," and as, under the 112th Article of War,[3] the reviewing authority cannot pardon or mitigate the punishment of death, or of dismissal of an officer, it affords opportunity for exercise of the executive clemency if the President thinks proper to exercise it, and which the reviewing authority may sometimes think desirable. The reviewing

[1] Kirkman v. McClaughry, 152 Fed. Rep. 255; Id. 160 Fed. Rep. 436.
[2] See post, par. 818. [3] See post, par. 819.

authority must have approved the sentence so as to make it effective before he can suspend it; it is not a sentence in force until it has been approved by the proper authority. If it has been disapproved by him it is of no effect and there is no sentence remaining to suspend or transmit.

Where a case is submitted to the President for his action under this Article, he may approve or disapprove the sentence in whole or in part, and, if he approve, may exercise his power of remission or mitigation.[1]

[1] Dig. Op. J. A. G. 340.

## CHAPTER XXV

### PARDON OR MITIGATION OF PUNISHMENT—REVIEW OF PROCEEDINGS OF COURTS-MARTIAL BY CIVIL COURTS

**446.** The power of the President to pardon offenses against the United States is unlimited by the Constitution except as to cases of impeachment.[1]

The punishment imposed by the sentence of a court-martial is subject to pardon or mitigation by the reviewing authority; it may be lessened in severity but never increased by him.

The power to "pardon" and to "mitigate" punishments adjudged by sentence of courts-martial is granted to commanders authorized to order such courts by Art. 112 of the Articles of War, and by Sec. 3, Act of June 18, 1898.

Article 112.—Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held shall have power to pardon or mitigate any punishment which such court may adjudge.[2]

The Act of June 18, 1898, provides: "Sec. 3. That the commanding officers authorized to approve the sentences of summary courts and superior authority shall have power to remit or mitigate the same." [3]

[1] Const., Art. II, Sec. 2. [2] See post, par. 819. [3] See Appendix B.

**447.** The power to remit or mitigate punishment imposed by a court-martial, vested in the authority who appointed the court or the corresponding authority under whose jurisdiction the sentence is being executed, extends only to unexecuted portions of a sentence, and if the punishment be one imposed by a general court-martial, such action may be taken only by an officer competent to order a general court-martial, and under whose jurisdiction the sentence is being executed. An executed sentence is not subject to remission or mitigation. A military prisoner sentenced to confinement in a penitentiary or in the U. S. Military Prison or any branch thereof, is beyond the jurisdiction of a division or department commander, so far as the exercise of clemency is concerned, from the the date of approval of his sentence.[1]

**448. Remission.**—The pardoning power herein granted is different from and inferior to that vested in the President by the Constitution. Remission is of the quality of pardon but of an inferior degree, the power to pardon including the power to remit. "The attributes, therefore, of the constitutional pardoning power of the President will be found to characterize in a measure the power of remission possessed by the reviewing officers, who, indeed, in the exercise of this power, may be regarded as the agents or representatives of the Executive in military cases."[2]

**449.** Remission is relieving the person from a punishment, or the unexecuted portion of a punishment, but not pardoning the offense as such or removing the disabilities or penal consequences attaching thereto on conviction. It is action of the reviewing authority taken after punishment has been awarded. The pardoning of "punishment," authority for which is vested in certain commanders under the 112th Article of War, is remission, and not a pardoning of the "offense."[3]

[1] A. R. 951; G. O. 146, War Dept. 1908.
[2] Winthrop, Vol. 1, p. 662. [3] Dig. Op. J. A. G. 2164.

Where an unconditional remission has been made it cannot be recalled and the sentence, or any part thereof that has been remitted, revived.

**450. Mitigation.**—The power to mitigate, unlike the power to remit, is not a form of the pardoning power, but "is a power attached as an *incident* to the power to order courts and approve and execute their sentences, being simply a discretion vested in the reviewing authority to reduce, when deemed by him just or expedient, the measure of punishment awarded by the court." [1]

Mitigation is the reduction by the reviewing authority of the punishment adjudged by the court, by reducing it in quantity or quality, or both, without changing its species. Imprisonment, fine, forfeiture of pay, and suspension, are punishments capable of mitigation.[2] This power is exercised by the reviewing authority at the time he acts upon the sentence of the court-martial.

**451.** Where the sentence awards punishment by confinement in the post guard-house or a military prison, the reviewing authority cannot increase the punishment by designating a penitentiary as the place of confinement of the prisoner, but he may mitigate a sentence to the penitentiary, if legally adjudged, by designating the post guard-house, or a military prison, as the place of confinement.

**452.** A department commander may remit or mitigate the unexecuted sentences of enlisted men under his command, notwithstanding the court which awarded them was convened and the sentences approved by the commander of another department.[3]

As the power of "mitigation" is exercised at the time of the action of the reviewing authority on the sentence

[1] Winthrop, Vol. 1, p. 662.
[2] Dig. Op. J. A. G. 345.
[3] Cir. 20, War Dept., June 15, 1901.

adjudged, the later action, after the sentence has been approved and punishment awarded, relieving the person from any part, or all, thereof, partakes of the character of "remission." [1]

The pardoning power conferred by the Article, which is the power of "remission," [2] is not limited in its exercise to the moment of approving the sentence, but may be employed as long as there remains any material for its exercise.

A department commander, or other proper and legal commander, may remit at any time, in his discretion, the unexecuted portion of the sentence of any soldier under his jurisdiction, imposed by a court-martial convened by him or by a predecessor in command.[3]

**453. Commutation.**—Where, as in cases of sentences of death, dismissal of an officer, or dishonorable discharge, there can be no lesser degree of the same punishment to which the sentence may be reduced by way of mitigation, mercy can only be shown by the substitution of some other punishment, different in nature, for that named in the sentence, and such action is a change of penalty, or commutation.

**454.** "The power to commute (or remit) sentences of death, or dismissal of an officer, is reserved to the President,[4] and a military commander cannot exercise such power even where, in time of war, he is authorized to approve such a sentence and carry it into effect."[5] "A reviewing authority other than the President is not empowered to *commute* a punishment; the *pardon* herein specified (Art. 112) is *remission*, which, unlike the pardoning power vested in the President, does not include commutation or

[1] See Dig. Op J. A. G. 345.
[2] Id. 347.
[3] Id. 344; A. R. 951, G. O. 146, War Dept. 1908.
[4] Art. 112. See ante, par. 446.
[5] Davis' Military Law, p. 552.

conditional pardon." A reviewing officer, for example, cannot commute the punishment of dishonorable discharge, and, as such punishment awarded by itself is not susceptible of mitigation, it cannot legally be reduced under this article.[1] "But a legal sentence of dishonorable discharge, forfeiture of all pay and allowances due, and confinement at hard labor for a definite period may be mitigated by the authority who appointed the court or the corresponding authority under whose jurisdiction the sentence is being executed, to confinement at hard labor and forfeiture of all pay and allowances for a period not to exceed the period of confinement awarded in the sentence."[2]

455. An application for clemency in case of a prisoner sentenced to confinement in a penitentary, or in the U. S. Military Prison or any branch thereof, will be forwarded to the Secretary of War for the action of the President. The power to commute sentences imposed by military tribunals, not being vested in military commanders, can be exercised by the President only.[3]

**456. Review of Proceedings of Courts-martial by Civil Courts.**—When a court-martial is legally constituted and proceeds within its legal power, its proceedings are not subject to review by the civil courts. It is only when the question is one as to its jurisdiction—its legal constitution, observance of the statutory rules prescribed for the exercise of its jurisdiction, or the legal use of its power of punishment—that such review may be had.

The civil court will act only upon the question of "jurisdiction," and if it finds that the court-martial had it, such courts will not interfere to correct errors or mistakes in its proceedings. Mere matters of procedure cannot be reviewed by them. The judgments of courts-martial are

[1] Dig. Op. J. A. G. 347.
[2] Court-martial Manual, p 67, par. 8.
[3] A. R. 951, G. O. 146, War Dept. 1908.

as final and conclusive as those of civil tribunals of last resort.[1]

The action of the court upon a plea of the statute of limitations is a part of the proceedings and therefore cannot be reviewed by the civil courts.[2]

**457. Writ of Habeas Corpus.**—Where a court-martial exceeds its jurisdiction or inflicts punishment forbidden by law, a writ of *habeas corpus* may issue in cases where confinement has been imposed. It cannot be used, however, to serve the purpose of a writ of error.[3]

**458. Writ of Prohibition.**—Whether the civil courts of the United States can issue a writ of prohibition to courts-martial or not, appears to be an open question which the Supreme Court of the United States has not yet decided.[4]

The object of a writ of prohibition is to prevent a court of peculiar, limited, or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance. It can only be used to restrain judicial functions; it cannot be granted upon the ground of irregularities in the proceedings, or for insufficiency of the charges or specifications, or to correct mistakes of a court-martial in the decision of questions of law or fact under its jurisdiction;[5] nor is the fact that the accused has been tried for the same act by the civil courts a proper basis for a writ of prohibition.[6]

But, in any event, and in any of the courts, the writ

[1] In re McVey, 23 Fed. Rep. 878; Carter v. McClaughry, 183 U. S. 365; Dynes v. Hoover, 20 How. (61 U. S.) 81; Ex parte Reed, 100 U. S. 23; In re Grimley, 137 U. S. 147; Carter v. Roberts, 177 U.S. 496.

[2] In re Davison, 21 Fed. Rep. 618; Ex parte Townsend, 133 Fed. Rep. 74.

[3] Ex parte Milligan, 4 Wall. (71 U. S.) 2; Carter v McClaughry, 183 U. S. 365; McClaughry v. Deming, 186 U. S. 49; Deming v. McClaughry, 113 Fed. Rep. 639. See Habeas Corpus, ante, par. 225 et seq

[4] See Smith v. Whitney, 116 U. S. 175, 176; Foster's Federal Practice, 2d Ed., Sec. 362.

[5] Smith v. Whitney, 116 U. S. 176.

[6] U. S. v. Maney, 61 Fed. Rep. 140.

cannot be issued when the court-martial has jurisdiction of the case, nor can it be made to take the place of a writ of certiorari, or writ of error used to inquire into the matters of pleading or the merits of the case; it cannot be made use of to correct errors of law or fact within the jurisdiction of the court.

The Supreme Court of the United States says concerning it: "This court, although the question of issuing a writ of prohibition to a court-martial has not come before it for direct adjudication, has specifically recognized the general rule that the acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writs of prohibition or otherwise." [1]

In some of the States, however, the civil courts have issued writs of prohibition to militia courts-martial convened under the laws of such States.[2]

[1] Smith v. Whitney, 116 U. S. 167, 177.
[2] American and English Encyclopædia of Law, Vol. 23, p. 222.

## CHAPTER XXVI

### COURTS OF INQUIRY

**459.** The court of inquiry is not a judicial tribunal, though assimilated in some respects to the court-martial in its composition, organization, power to compel the attendance of witnesses, and to receive their evidence under the sanction of an oath. It is, in fact, a council, commission, or board of officers, convened for the purpose of a special investigation into the nature of a transaction of, or accusation or imputation against, any officer or soldier.

Its inquiries are not affected by any limitations of time, and Art. 103 of the Articles of War cannot be pleaded in bar of the proceedings as it may be in cases before courts-martial.[1]

**460.** Its existence and the authority under which it acts are derived from the following Articles of War:

Article 115.—A court of inquiry to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier, may be ordered by the President or by any commanding officer; but, as courts of inquiry may be perverted to dishonorable purposes, and may be employed, in the hands of weak and envious commandants, as engines for the destruction of military merit, they shall never be ordered by any commanding officer except upon a demand by the officer or soldier whose conduct is to be inquired of.

Article 116.—A court of inquiry shall consist of one or

[1] See ante, par. 191.

more officers, not exceeding three, and a recorder, to reduce the proceedings and evidence to writing.

Article 117.—The recorder of a court of inquiry shall administer to the members the following oath: "You shall well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."

Article 118.—A court of inquiry, and the recorder thereof, shall have the same power to summon and examine witnesses as is given to courts-martial and the judge-advocates thereof. Such witnesses shall take the same oath which is taken by witnesses before courts-martial, and the party accused shall be permitted to examine and cross-examine them, so as fully to investigate the circumstances in question.

Article 119.—A court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so.

Article 120.—The proceedings of a court of inquiry must be authenticated by the signatures of the recorder and the president thereof, and delivered to the commanding officer.[1]

**461. Composition.**—The court of inquiry consists of one or more officers, not exceeding three, and a recorder, all of whom are sworn to a faithful and impartial performance of their duties.[2] The rank of the officers who are members relative to that of the person under accusation or imputation is not prescribed by law, the limitation of the 79th Article of War, that "no officer shall, when it can be avoided, be tried by officers inferior to him in rank," not applying to courts of inquiry.

[1] See post, par. 822–826. [2] Art. 116, 117.

**462. Constitution.**—A court of inquiry may be convened at any time by the President, but never by a commanding officer except upon demand of the officer or soldier whose conduct is to be inquired into.

The term "commanding officer" is not restricted by the statute, but the court of inquiry should not in general be ordered by an inferior—post or regimental—commander, where the charges required to be investigated are not such as an inferior court-martial could legally take cognizance of.[1] The word "demand" in the 115th Article of War has been construed as synonymous with "request" or "application for." It is optional with the commanding officer to refuse the application; but in event of such refusal the applicant may, if not satisfied, appeal to higher authority.[2]

**463.** The form of the order convening a court of inquiry is similar to that of a court-martial, the members and the recorder being designated by name and rank, and the transaction, accusation, or imputation to be investigated is specified in the order; and if the court is to give an opinion on the merits of the case the order must so direct, otherwise no such opinion will be given.[3]

### MODE OF PROCEDURE

**464. Organization.**—The court meets at the time and place directed, and the fact that the members and the recorder are present is recorded, as is also the presence of the person whose transactions, or conduct, are to be investigated if he is actually present, though his presence is not obligatory or essential.[4] If a member is absent or the court reduced below the number named in the order, by any cause, the convening authority should be notified, so that he may, if he desire, replace such member or

[1] Dig. Op. J. A. G. 367.
[2] Winthrop, Vol. 1, p. 737.
[3] Art. 119.
[4] Winthrop, Vol. 1, p. 745.

members; for a new member may be detailed to take his seat during the inquiry.

The accuser, if any, and the accused, or any officer whose conduct will be materially involved in the inquiry, each with counsel if desired, are also generally allowed to be present.[1]

**465. Reporter.**—A reporter may be allowed in important cases, his employment and rate of compensation being in the discretion of the Secretary of War. Such reporters are usually paid the rates fixed by Army Regulations for reporters of general courts-martial.[2]

**466. Challenges of Members.**—By the custom of the service, members of courts of inquiry are subject to challenge in the same manner as before courts-martial,[3] and when the court is composed of two or more members and the number is reduced by casualty, or challenge, the convening authority should be notified, so that a new member may be detailed during the inquiry. But the court may legally proceed with the reduced number.[4]

**467. Oath of Members and Recorder.**—The oath, Article 117, is administered to the members by the recorder, and to the recorder by the president of the court.[5]

**468. Function of the Court of Inquiry.**—The function of a court of inquiry is solely that prescribed in the articles quoted above. Such courts are limited in their operation to "officers or soldiers"; they cannot be ordered to investigate transactions of, or accusations or imputations against, persons not in the military service or those who have been separated therefrom, even though such transactions, accusations, etc., relate to their acts or conduct while in the Army.[6]

[1] Winthrop, Vol. 1, p. 745.
[2] Court-martial Manual, p. 85.
[3] Davis' Military Law, p. 221.
[4] Court-martial Manual, p. 85.
[5] Art. 117. See par. 460, supra.
[6] Dig. Op. J. A. G. 366.

**469.** The court, as well as the recorder, has the same power to summon and examine witnesses as is given to courts-martial and the judge-advocates thereof.[1] But not being a court in the legal meaning of the term, it has no power to punish for contempt. The Act of March 2, 1901 (G. O. 27, A. G. O., 1901), providing for the punishment of a civilian witness for refusing to appear or testify, is limited by its terms to general courts-martial.[2] The authority to issue process to compel civilian witnesses to appear and testify, vested in every judge-advocate of a court-martial, does not extend to recorders of courts of inquiry.[3]

**470. Examination of Witnesses.**—The examination of witnesses and the introduction of evidence is proceeded with substantially as before courts-martial, each witness taking the same oath, administered by the recorder, as is taken by witnesses before courts-martial.[4] The party accused has the right to examine and cross-examine the witnesses so as fully to investigate the circumstances in question, and may introduce witnesses of his own, and object to witnesses and testimony offered by the recorder, and may interrogate and impeach them. He may also take the stand himself as a witness, at his own request, under provisions of the Act of March 16, 1878, subject to cross-examination.

**471.** The inquiry not being a judicial proceeding, the court is not called upon to enforce the rules of evidence so strictly as they would be, in general, in a court-martial, but it will ordinarily be safest and most equitable to observe them.[5]

The court of inquiry, equally with the court-martial,

[1] Art. 118.
[2] Dig. Op. J. A. G., p. 107, note; Winthrop, Vol. 1, p. 749.
[3] Dig. Op. J. A. G. 2478.
[4] Art. 118. See par. 460, supra.
[5] Winthrop, Vol. 1, p. 750.

has the power to act upon and determine questions as to the admissibility of evidence, including depositions, offered before it.

**472.** The proceedings of courts of inquiry may be either closed or open according to the discretion of the court, and where the case is one that makes such action desirable, the doors would properly be closed upon the public; but Article 118 provides for the summoning and examination of the witnesses and that the accused may examine or cross-examine them, and the custom of the service permits the presence of his counsel, and of the accuser and his counsel, and of the necessary clerks.

In its final deliberations, however, or where it is desired to consider some interlocutory question without publicity, the court is cleared and doors are closed as in the case of a court-martial.[1]

**473. Duties of Recorder.**—The duties of the recorder are similar to those of a judge-advocate of a general court-martial. He prepares the case so as to avoid delay when the court meets; summons witnesses, having the same power therefor as the judge-advocate of a court-martial;[2] prepares the room for its meeting, procures the necessary stationery, etc. He acts for the government in the investigation, administers the oath to the court and to witnesses, asks necessary questions of witnesses, etc., and is required to "accurately and impartially record the proceedings of the court and the evidence to be given." [3] He is not the adviser of the court, nor a prosecutor before it, but must assist the court, if it so desires, in all matters leading to correct conclusions of law and of fact.[4]

**474. The Record.**—The record is made up in a form and manner similar to that of a general court-martial, and

[1] Winthrop, Vol. 1, p. 748.
[2] Art. 118. See ante, par. 460.
[3] Art. 116, 117. See ante, par. 460.
[4] Court-martial Manual, p. 86.

must be authenticated by the signatures of the recorder and president, and delivered to the commanding officer [1] who convened the court, or to the President, if convened by him.

The record consists of two parts: (1st) the testimony of the witnesses, including the documentary evidence submitted and the arguments or statements made by those subject to investigation, and (2d) the report proper, that is, a recital or statement of the facts constituting the occurrence referred to the court for examination. This report is based upon and derived from the testimony submitted and the evidence adduced, and its statements must be supported thereby; reference to the testimony of witnesses may be used, and the use of foot-notes and cross-references is also authorized.[2] When it is so ordered the court also records its opinions on the merits of the case.

**475.** While it is desirable that the members of a court of inquiry, directed to express an opinion, should concur in their conclusions, they are not required to do so by law or regulations; members may disagree and submit a separate report, or reports, accordingly.[3]

The report or conclusion of a court of inquiry is considered to be of the nature of a confidential communication to the convening authority, and, like the findings and sentence of a court-martial, should not be disclosed by the members of the court, or the recorder, until published by the proper authority.

**476. Action on the Proceedings.**—The record of the court when received by the convening officer may be acted upon, in his discretion, by approval or disapproval. He may decide that no further action is necessary or, if sufficient grounds exist for it, he may order a court-martial in the case.

[1] Article 120. See ante, par. 460; post, par. 827.
[2] Davis' Military Law, p. 222.
[3] Dig. Op. J. A. G. 370.

If the proceedings are not satisfactory to him he may return them for revision or further investigation, and the court may be required, upon revision, to rehear witnesses or to take entirely new testimony, or it may do so of its own motion.[1]

**477.** The proceedings having received his final action, the convening authority may publish, in orders, the whole or part, or the substance, of the report of the court, or the result alone, as, for example, that it is determined that no further proceedings are called for in the case; or he may omit altogether to publish it.[2]

**478. Use of the Proceedings as Evidence.**—It is provided by the 121st Article of War that "The proceedings of a court of inquiry may be admitted as evidence by a court-martial, in cases not capital nor extending to the dismissal of an officer: *Provided*, That the circumstances are such that oral testimony cannot be obtained."

The proceedings of the court of inquiry will properly be proved before the court-martial either by the original record of the court, or by a copy thereof certified by the Judge-Advocate-General, or other official in whose custody the original may be.[3]

Persons desiring a copy of the proceedings of a court of inquiry may apply to the Secretary of War therefor.[4]

[1] Winthrop, Vol. 1, pp. 752, 753.
[2] Id.
[3] Id., p. 754.
[4] Dig. Op. J. A. G. 361, 364.

## CHAPTER XXVII

### RETIREMENT—RETIRING BOARDS

**479.** Congress has made provision by law for the retirement of officers who have attained a fixed age, or who have had a certain number of years of service, or who have become incapable, in any way, of performing the duties of their office. Officers retired from active service are withdrawn from command and from the line of promotion.[1]

**480.** Such officers, however, unless "wholly" retired, still form a part of the military establishment, are entitled to wear the uniform of the rank on which they may be retired, are borne upon the Army Register, and though not in active service are subject to discipline as other officers and may be tried and sentenced by court-martial for any breach of the rules and articles of war.[2] As they still constitute a part of the Army, they are properly exempt from the public obligations peculiar to civilians, such as jury service, etc., though if summoned for duty as juror in any court, they should appear and urge the objection, arising from their military status, to the judge for the determination of the court.[3]

**481.** Whether a retired officer holds a public office or not within the meaning of the statutes is still apparently open to question,[4] though it has been held that they do

[1] Sec. 1255, R. S.
[2] Sec. 1256, R. S.; U. S. v. Tyler, 105 U. S. 244; Closson v. U. S., 7 App. Cases, D. C. 460.
[3] Dig. Op. J. A. G. 2201.
[4] See Dig. Op. J. A. G. 2210, and Id., p. 623, note.

not, except when assigned to duty under some statute, exercise public office. "They are in fact pensioners." [1] And "a retired officer is not prohibited by law from holding office in an executive department, or as a department clerk, nor from receiving the salary thereof in addition to his retired pay." [2] Section 1222, Revised Statutes, prohibiting the accepting or holding of civil office, is held not to apply to retired officers. They may hold any State, county, or municipal office and receive the pay and emoluments of the same without military office or pay being in any manner affected.[3]

The provision of Sec. 1763, Rev. Stat. U. S., prohibiting any person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, from receiving compensation for discharging the duties of any other office, has since been modified by an act containing the same provision, but with the following addition: "but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office, or whenever the President shall appoint them to office by and with the advice and consent of the Senate." [4]

Retired officers may now, with their consent, be assigned by the Secretary of War to active duty in recruiting; for

[1] Davis' Military Law, p. 238; Ives, p. 292; Dig. Op. J. A. G. 2209; Geddes v. U. S., 38 Ct. Cl. 429.

[2] Dig. Op. J. A. G. 2202; Id., p. 620, note 4. See also Id., p. 505, note 1; Collins v. U. S., 15 Ct. Cl. 22; Badeau v. U. S., 130 U. S. 439, 452; Yates v. U. S., 25 Ct. Cl. 296.

[3] Dig. Op. J. A. G. 1823. See 22 Op. Attorney-General 88.

Retired officers may be assigned to duty at the Soldiers' Home (Sec. 1259, R. S.); be appointed to civil office, not being prohibited therefrom by the wording of Sec. 1259, R. S. (In re Smith, 19 Op. Att'y-Gen. 283; Fed. Stat. Annotated, Vol. 7, p. 1034; see U. S. v. Brindle, 110 U. S. 688; U. S. v. Saunders, 120 U. S. 126); may be employed on active duty, other than the command of troops, in time of war (Act March 2, 1899); be detailed at any time as Adjutant-General of the militia of the District of Columbia (Act June 6, 1900); or be employed as president, superintendent, professor, or instructor at any college or other institution of learning (Sec. 1225 and 1260, R. S.).

[4] Act July 31, 1894; Supplement to Rev. Stat., Vol. 2, p. 212.

service in connection with the organized militia in the several States and Territories, upon the request of the governor thereof; as military attachés; upon courts-martial, courts of inquiry, and boards; and to staff duties not involving service with troops.[1]

The office of an officer of the Army and his rank are not necessarily identical. When an officer is retired the office remains the same though different rank may be conferred upon him as a title of distinction; and in connection with this change of rank his pay may be changed. The rank and pay of a retired officer are within the control of Congress.[2]

### RETIREMENT BY LAW

**482.** The law provides that "when an officer has served forty years either as an officer or a soldier in the regular or volunteer service, or both, he shall, if he make application therefor to the President, be retired from active service and placed on the retired list; and when an officer is sixty-four years of age, he shall be retired from the active list and placed on the retired list." [3] "When an officer has been thirty years in the service he may, upon his own application, in the discretion of the President, be retired from active service and placed upon the retired list." [4]

**483.** When any officer has served forty-five years as a commissioned officer, or is sixty-two years old, he may be retired from active service at the discretion of the President.[5]

This law has since been modified by a provision that

[1] Act April 23, 1904; G. O. 76, War Department, 1904.
[2] Wood v. U. S., 107 U. S. 416, 417.
[3] Act June 30, 1882.
[4] Sec. 1243, R. S.
[5] Sec. 1244, R. S.

service as an enlisted man shall be credited in computing service for longevity pay and retirement.[1]

**484.** It is held that in computing service under Section 1243, Revised Statutes, the period served by the officer as a cadet at the Military Academy is legally counted.[2]

**485.** In neither of the cases under the laws above stated is there any requirement for the action of a retiring board; the matter lies wholly within the hands of the officer and the President, and the limits prescribed by the law, retirement at the age of sixty-four being compulsory.

### RETIRING BOARDS [3]

**486.** When any officer has become incapable of performing the duties of his office, he must be either retired from active service, or wholly retired from the service,[4] and this is accomplished through the finding of a retiring board acting upon the case.

**487. Composition and Constitution of Retiring Board.**—This board is authorized by the following law: The Secretary of War, under the direction of the President, shall, from time to time, assemble an Army retiring board, consisting of not more than nine nor less than five officers, two-fifths of whom shall be selected from the Medical Corps. The board, excepting the officers selected from the Medical Corps, shall be composed, as far as may be, of seniors in rank to the officer whose disability is inquired of.[5]

**488.** In order to constitute a legal board there must be, therefore, not more than nine officers, nor less than five, and two-fifths of the board must be officers of the Medical Corps.

[1] Act June 18, 1878, Sec. 7.
[2] Dig. Op. J. A. G. 2205.
[3] For form of order and record, see Appendix E, 9.
[4] Sec. 1245, R. S.
[5] Sec. 1246, R. S.

**489.** The members of the board are designated in the order of the Secretary of War, their names, rank, etc., and that of the recorder, being stated in the order. There is no statutory authority for the appointment of a recorder, but, under the custom of the service, the Secretary of War appoints a recorder for each retiring board. He is not a member of the board, and simply takes down the testimony and records the proceedings. He will, however, carry out such instructions as may be given him by the board, and may be required by the latter to collect evidence, present it to the board, examine the witnesses, and, generally speaking, conduct the case for the Government.[1]

**490.** The provision of the statute as to the rank of the members is directory only, and the decision of the convening authority, as evidenced by the selection of the members of the board, is conclusive.[2]

### PURPOSE AND POWERS

**491.** The board is empowered to inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose.[3] But this does not authorize such a board to entertain a charge of a military offense as such, nor to *try* an officer.[4]

**492.** In pursuance of Sec. 1246, Revised Statutes, it is required that "when an officer becomes disabled for the performance of duty by reason of wounds, sickness, or improper habits, his immediate commander will report the facts to the department commander for the action of the War Department. The report in each case will con-

[1] Court-martial Manual, p. 87.
[2] Id.
[3] Sec. 1248, Revised Statutes.
[4] Dig. Op. J. A. G. 2192.

tain specific statements and the names of witnesses by whom they can be substantiated." [1]

"Habitual intemperance, gambling, or other vices that tend to corrupt an officer and lower the professional standard will be regarded as proper subjects for the consideration and report of a retiring board." [2]

**493.** These regulations prescribe the method by which the incapacity of an officer is brought to the attention of the Secretary of War, and those things which the board must take into consideration in determining the cause of the disability.

**494.** "The provision of Sec. 1248, Revised Statutes, that the board 'shall have such powers of a court-martial and of a court of inquiry as may be necessary,' etc., is indefinite"; but construed in connection with the other provisions cited, "its evident intention is that the board shall have and exercise such powers of a 'court' as may be requisite to insure a full investigation, to afford a fair hearing, and to enable it satisfactorily to determine the questions referred. Thus it is properly authorized and empowered to call for and entertain such testimony of witnesses, depositions, documents, or papers, as may be material to establish or illustrate the nature or extent of the disability, to pass upon questions of admissibility of evidence, to grant continuances, to give the officer ordered before it a reasonable opportunity of defense if desired, to find and report in his absence if he fails to appear; and, further, to determine the relevancy and validity of challenges to its members" according to the 88th Article of War, and to punish acts in the nature of contempt according to the 86th Article of War, "if necessary to an impartial and complete inquiry." [3]

**495.** "In the execution of the duty thus imposed by law, the board is required to ascertain the nature and

[1] A. R. 76. [2] A. R. 77. [3] Court-martial Manual, p. 90.

extent of the disability and its character and effect, as temporary or permanent. The evidence upon which to base its findings in this regard should be derived chiefly but not exclusively from the report of the medical officers, and from the authenticated extracts from the departmental records which show the cases in which the officer has received medical or surgical treatment during his connection with the military service."

**496.** "The board having established the fact of incapacity for active service must seek the cause of such incapacity and determine whether the cause so ascertained is an *incident of service;* that is, a thing which inseparably belongs to, is connected with, or inheres in the military service. Battles, marches, the performance of the several duties in garrison or in the field which are imposed upon officers of the line or staff by law, regulations, the lawful orders of competent military superiors, by an established custom, or by the exigencies or necessities of the military service—all of these make up and constitute the 'incidents of service,' one or more of which must be ascertained by the board as the determining cause of an incapacitating disability. If the disabling cause be a wound or injury, the wound or injury must have resulted from an incident of the service; if it be a disease, the disease must have been the result of an incident or a succession or aggregation of incidents of the service; in other words, the board must pass from the disability to the occasion or circumstance of which it is the direct result, and that occasion or circumstance must be a thing so inseparably associated with the military service, so directly connected with it and growing out of it, as to entitle it to be regarded as an incident of the service." [1]

**497.** "If an officer participates in military operations, or serves in a locality where the climatic or other causes

[1] Court-martial Manual, pp. 90, 91.

are such as to induce a particular form of disease, and, having taken due and reasonable precautions to prevent it, contracts such disease, then if disability results its cause would properly be regarded as an incident of service within the meaning of the statute. But when a disease is contracted, not due to exposure or to the existence of conditions such as have been described, the board will require the production of testimony showing that it is not due to vicious or irregular habits, and that there has been neither carelessness nor contributory negligence on the part of the officer, who is bound as a prudent man and a conscientious public officer to use every proper means at his command to preserve his health and to maintain his physical efficiency under all conditions of service." [1]

**498.** The disability which the board is to inquire into is an existing physical or mental incapacity, not a moral defect or a criminal amenability. If the case be one calling for trial and punishment, it should be referred to a court-martial.[2]

**499. Recorder.**—Although there is no statutory provision for a recorder, custom of service authorizes his appointment and his duties are similar to those of a judge-advocate of a court-martial or the recorder of a court of inquiry. He prepares the place of meeting, stationery, etc., and, acting under instructions of the Board, summons and examines the witnesses, collects the evidence, conducts the case for the government, records the proceedings, and authenticates the record. He may be assisted by a stenographic reporter employed on the authority of the Secretary of War, previously obtained, which authority must be filed with the voucher on which payment is made. The form of voucher used will be that provided for payment of reporters for general

[1] Court-martial Manual, p. 91; Circular War Department, February 27, 1904.

[2] Court-martial Manual, p. 90.

courts-martial, with necessary changes in the wording of the form.[1]

**500. Procedure.**—The procedure of the board is closely assimilated to that of a court of inquiry, and the rules which govern such court are applicable. It is the duty of the board itself, however, to examine the witnesses if necessary and to develop the facts pertinent to the investigation required of it, not depending entirely upon their examination by the recorder. The board is merely an advisory board and is not bound by the statutes or regulations governing courts-martial.[2]

**501. Right of Officer to be Heard.**— The board having organized, and the members and the recorder being present, it is the right of the officer whose case is to be considered to be present and to be heard before the board, if he desires it. This right is guaranteed by the provision that "Except in cases where an officer may be retired by the President upon his own application, or by reason of his having served forty-five years, or of his being sixty-two years old, no officer shall be retired from active service, nor shall an officer, in any case, be wholly retired from the service, without a full and fair hearing before an Army retiring board, if, upon due summons, he demands it." [3]

If, having had due summons, he fails to appear before the board and to demand a hearing, he waives the right, is himself in default, and the board may proceed without him, and he cannot take exception to a conclusion arrived at in his absence.[4]

**502.** The above provision of law (par. 501) entitles the officer subject to be thus retired "to appear before the board, with counsel if desired, and to introduce testimony of his own, and to cross-examine the witnesses

[1] Court-martial Manual, p. 87. See Form, Appendix E, 21.
[2] Carrick v. U. S., 24 Ct. Cl. 265.
[3] Sec. 1253, Revised Statutes.
[4] Dig. Op. J. A. G. 2197.

examined by the board, including the medical officers of the board who may have taken part in the medical examination, and have stated or reported to the board the result of the same." [1]

**503. Challenge.**—The officer, with his counsel, may appear before the board, and as the law prescribes that he shall have "a full and fair hearing" he may exercise the right of challenge. This is done in a manner similar to that before courts-martial, the cause being stated, and the member replying and, if necessary, being examined on his *voir dire*, and if the board is satisfied that the challenged member entertains malice or prejudice that will prevent his giving the case a fair hearing, such member is excused from sitting. The board cannot proceed, however, with less than five members, two of whom must be of the Medical Corps. Should they be reduced below this number, or proportion, the board should adjourn, reporting the facts to the convening authority.

**504. Oath.**—The board having the proper number to proceed after the challenges have been acted upon, the members thereof are then duly sworn in accordance with the provision of law that "the members of said (retiring) board shall be sworn in every case to discharge their duties honestly and impartially." [2]

The oath is administered by the recorder, and the following form complies with the statute: "You (naming the members) do swear that you will honestly and impartially discharge your duties as members of this board in the matter now before you. So help you God." The presiding officer of the board then administers the following oath to the recorder: "You (naming him) do swear that you will, according to your best ability, accurately and impartially record the proceedings of the board and the evidence to be given in the case in hearing. So help you

[1] Court-martial Manual, p. 88. [2] Sec. 1247, Revised Statutes.

God." [1] The oath administered to a witness is the same as that to a witness before a court-martial.[2]

**505.** When an officer comes before a retiring board it is the duty of the medical officers of the board to make a thorough medical examination of him, and to reduce the result to writing, which is submitted to the board.

**506.** When the officer desires retirement, it is proper for him at the beginning of the hearing to state under oath the nature and cause of his disability, the recorder and members of the board asking such questions as will help bring out the facts. He may also be interrogated as to his military history.

But if the retirement is opposed by him he cannot be required to testify against himself.[3]

**507.** After the testimony of the officer has been taken, the senior medical officer is sworn as a witness, and submits the statement of the result of the medical examination of the officer, and is interrogated as to the cause and permanency of the disability and the degree of incapacity for active service. The other medical officer or officers (if more than two) are similarly examined.

The recorder then submits documentary evidence which he has received from The Adjutant General,[4] and which is duly authenticated by the official seal of his office or by his signature.

Other evidence may then be introduced; and the officer before the board has the right to object to improper evidence, to interrogate the witnesses, and may himself introduce evidence, if legal, material, and relevant, and may submit a written statement.[5]

**508. Statute of Limitation.**—The investigation of a retiring board is not affected by any limitation of time

[1] Court-martial Manual, p. 89.
[2] Art. 92.
[3] Court-martial Manual, p. 92
[4] A. R. 26.
[5] Court-martial Manual, p. 92.

as is that of a court-martial by the 103d Article of War, and it may therefore inquire into the matter of a disability no matter how long since it may have originated.[1]

FINDING

**509.** When the investigation is completed, the board is closed for deliberation, and determines whether the officer before it for examination is incapacitated for active service or not. The recorder need not retire during this deliberation.[2]

When the board finds an officer incapacitated for active service, it must find and report the cause which, in its judgment, has produced his incapacity, and whether such cause is an incident of the service.[3] If it finds that his incapacity is the result of an incident of the service, and such decision is approved by the President, said officer shall be retired from active service and placed upon the list of retired officers.[4]

**510.** When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine. Officers wholly retired from the service are given one year's pay and allowances of the highest rank held by them at the time of their retirement;[5] and their names are omitted from the Army Register.[6]

When ample testimony establishes the fact that an officer has through vicious indulgence slighted or neglected his duties to such a degree as to make it unsafe to entrust him with a command, or with responsibility that properly

[1] Dig. Op. J. A. G. 2193; Benét, p. 240.
[2] Court-martial Manual, p. 93.
[3] Sec. 1249, Revised Statutes.
[4] Sec. 1251, Revised Statutes.
[5] Sec. 1275, R. S.
[6] Sec. 1252, R. S.

belongs to his grade, and when it is shown that such habits have continued for such length of time as to render permanent reformation improbable, this fact, rather than his condition when he appears before the board, shall weigh in its finding as to his incapacity for active duty.[1]

The finding should be framed in narrative form, and should not embrace any recommendation.

The board may modify its findings or decision at any time before forwarding its proceedings..

RECORD

**511.** The record is made up separately for each case, and when completed is authenticated by the signatures of the president and the recorder, and is transmitted by the latter to the Secretary of War, to be by him laid before the President for his approval or disapproval and orders in the case.[2] If any member dissents from the opinion of the board, it will be so stated.

THE REVIEWING AUTHORITY

**512.** The finding of the retiring board is in the nature of a recommendation and, until it is approved by the President, no retirement can be ordered thereon.[3] When approved by the President the finding is conclusive as to the facts.[4]

**513.** The board finds the facts and the President approves or disapproves the finding, but the law does not empower him to modify the finding or to substitute a different one. There is here a judicial power, vested in the two, and not in the President acting singly, and when the power has been once fully exercised it is exhausted as to that case.[5] The case cannot be re-opened, and if injustice has been done relief can be afforded by Congress

[1] A. R. 78.
[2] Sec. 1250, R. S.
[3] Dig. Op. J. A. G. 2194.
[4] Id. 2206.
[5] Dig. Op. J. A. G. 2206; see U. S. v. Burchard, 125 U. S. 179.

alone.[1] If the board should find the officer not incapacitated for active service, the President could not disapprove the proceedings and then retire him.[2]

**514. Revision.**—The President, however, in any case in which, in his judgment, the investigation has not been completed, or the finding is not justified by the facts, may return the proceedings for a further inquiry or hearing, or a correction of its conclusions, as in case of a court-martial.[3] Not being a court, the board, upon a reconsideration may and should, if so directed, re-examine former witnesses or take new testimony.[4]

RETIREMENT ON EXAMINATION FOR PROMOTION

**515.** The law of October 1, 1890, providing for the examination of all officers below the grade of major, before promotion in the Army, also provides that "Should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should fail for any other reason he shall be suspended from promotion for one year, when he shall be re-examined, and in case of failure on such re-examination he shall be honorably discharged with one year's pay from the Army."[5]

**516. Composition and Constitution of the Examining Board.**—The board, in each case, is to consist of five members, three of whom shall be officers of the same corps, department, or arm of the service as the officer to be ex-

[1] See Court-martial Manual, p. 94
[2] Ives, p. 292.
[3] Davis' Military Law, p. 237.
[4] Winthrop, Vol. 1, p. 706.
[5] The regulations prescribed by the President in accordance with this act were published in General Orders 81, War Department, 1904; those now in force are promulgated in General Orders 128, War Department, 1906, G. O. 147, War Department, 1907.

amined, and senior to him in rank; the junior of these officers other than medical officers shall act as recorder; the other two members shall be medical officers selected without limitation as to rank; they shall take part only in the physical examination of the officer. In the examination of officers of the Medical Department, the board will consist of three medical officers, to be designated by the Secretary of War,[1] the junior of whom shall act as recorder. If an officer of the Medical Department is found physically disqualified for promotion, the fact is reported to The Adjutant General of the Army, for the appointment of two line officers, senior in rank to the officer to be examined, as additional members.

The composition of a board for examination of a chaplain will be similar to that for other officers, except that, when practicable, one line officer is replaced by a chaplain of the same religious faith as the chaplain to be examined.

**517. Organization and Procedure.**—These boards are to meet at places named in the regulations therefor, and the members thereof are to be continued on such duty for not less than two years, except in cases of necessity. Their organization and procedure are assimilated to that of retiring boards, the recorder swearing the several members, including the medical officers, faithfully and impartially to examine and report upon the officer about to be examined, and the president of the board then swearing the recorder to the faithful performance of his duty as member and recorder. The proceedings are to be made up separately in each case.

**518. Challenges.**—Previous to the swearing of the members, they may be challenged for cause stated, the relevancy and validity of which shall be determined by the full board, according to the procedure of courts-martial.

The record must show that the right to challenge was accorded.

[1] G. O. 67, War Dept. 1908.

If the number of members is reduced by challenge or otherwise, the board must adjourn and the president of the board report the facts to The Adjutant General for the action of the War Department.

**519.** The officer to be examined is first thoroughly examined by the medical officers, who then report to the board. When the board finds an officer physically incapacitated for service, it concludes the examination by finding and reporting in full the cause which, in its judgment, has produced his disability, and whether or not such disability was contracted in the line of duty. The finding of the board must be stated as follows: "The board is of the opinion that ——— is physically incapacitated for service. His disability is due to ——— and was contracted in the line of duty"; and this is authenticated by the signatures of all members, including medical officers. If any member dissents from the opinion of the board, it will be so stated. If the incapacity is found to be the result of an incident of the service, and the proceedings of the board are approved by the proper authority, the officer is retired with the rank to which his seniority entitled him, whenever a vacancy occurs that otherwise would result in his promotion on the active list; provided he has not been placed on the retired list before the vacancy occurs.[1]

**520.** The officer whose physical incapacity is brought into question should have the same right to introduce evidence, examine and cross-examine witnesses as if before a retiring board.

**521.** If anything should arise during the examination requiring the introduction of evidence, the inquiry should proceed upon written interrogatories as far as possible, the board determining to whom questions shall be forwarded, and be conducted according to the procedure of courts-martial. When, in the opinion of the board, it becomes

[1] See Act Oct. 1, 1890; G. O. 81, War Department, 1904; G. O. 128, War Department, 1906.

essential to take oral testimony, the fact should be reported to the War Department for the necessary orders in regard to witnesses to be summoned from a distance. Witnesses examined orally are sworn by the recorder.

**522.** All public proceedings shall be in the presence of the officer under examination; the conclusions reached and the recommendations entered in each case shall be regarded as confidential.[1]

**523.** Medical officers do not take part in the professional examinations, except in cases of assistant surgeons. They make the necessary physical examination and report their opinion in writing to the board. All questions relating to the physical fitness of the officer are to be determined by the full board.[2]

**524.** The finding of the board of examination that the officer is incapacitated for duty is not *per se* final, but must be reported for the action of the Secretary of War and be acted upon by him. Where the finding and report of the board have been approved but not yet executed by actual retirement, there may intervene contingencies which would supersede such proceeding, as the trial and dismissal of an officer by court-martial, or the arising of new causes which might make it proper that the question of his disability be inquired into by a retiring board under Section 1246, Revised Statutes United States.

But unless some such new occasion and ground of disqualification be presented, the action of the Secretary of War, in approving the report, remains final and exhaustive, and the officer is entitled to be retired under the Act of October 1, 1890, and cannot legally be ordered before such retiring board.[3]

[1] G. O. 81, War Dept. 1904. [2] Id.; G. O. 128, Id. 1906.
[3] Dig. Op. J. A G. 2207.

(For regulations prescribed by the President, methods of procedure, subjects for examination, etc., see General Orders 128, War Dept. 1906, as amended by G. O. 4, 27, 111, 147, 159, 234, War Dept. 1907, G. O. 150, 1908, and G. O. 192, 1909.)

## CHAPTER XXVIII

### BOARDS—SURVEYS ON PROPERTY

**525.** Boards of officers are authorized for certain purposes, by law and by regulations, such as retiring boards, boards for the examination of officers for promotion;[1] or for examination of enlisted men for promotion, or of civilians for appointment to the grade of second lieutenant in the Army, etc.

When it is prescribed, the members and the recorder, if one, are duly sworn to a faithful and impartial performance of their duties. In boards for retirement of officers, or for examination of officers for promotion, or enlisted men for advancement, or of civilians for appointment to the grade of second lieutenant, two-fifths of the board must be medical officers.

**526.** Boards are also appointed for special purposes, as for determining whether a soldier's service has been honest and faithful;[2] to make an inventory and return of public property in charge of officers who die or become insane in the service;[3] to investigate the loss or destruction of private property of officers and enlisted men in the military service;[4] and whenever any investigation is to be made in any matter relating to the military service not otherwise provided for, the proper commanding officer, or the Secretary of War, may appoint an officer or a board of officers for the purpose.

[1] See Chapter XXVII.
[2] A. R. 146.
[3] A. R. 86; see Art. 125, post, par. 832.
[4] A. R. 729; Act of March 3, 1885.

**527. Organization.**—The organization, purpose, method of procedure, and requirements of each board are specified in the law, regulations, or orders authorizing it.[1]

**528. Oath of Members.**—The oath taken by the members and recorder, where prescribed by law, requires faithful and impartial performance of the duties devolving upon them; where no oath for members or recorder is prescribed they act upon their oath of office.

**529. Oath of Witnesses.**—Under the provisions of the Act of March 2, 1901: "Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army detailed to conduct an investigation, and the recorder, and, if there be none, the presiding officer of any military board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation." And where they testify orally the oath administered is similar to that prescribed for witnesses before a court-martial (Art. 92).

**530. Record.**—The record is made up by the recorder, or, if there be none, by the junior member of the board, in a manner similar to that of courts-martial or courts of inquiry, but, where not otherwise provided, it is authenticated by the signatures of all the members of the board. The report need not necessarily be unanimous, but any

[1] For retiring boards and for boards of examination of officers for promotion under Act of October 1, 1890, see Chapter XXVII; A. R. 76–78; G. O. 128 and 143, War Dept. 1906; G. O. 104, War. Dept. 1907. For boards of examination of enlisted men for advancement to the grade of second lieutenant, see G. O. 93, War Dept. 1906, paragraphs 27 to 33, A. R., as amended by G. O. 53, War Dept. 1906, and G. O. 148, War Dept. 1906; G. O. 2, War Dept. 1908. For boards of examination of civilians selected for appointment as second lieutenants in the Army, see G. O. 71, 1902; G. O. 55, War Dept. 1904; G. O. 131, War Dept. 1906; G. O. 148, War Dept. 1906; and paragraphs 34 to 37, A. R., as amended by G. O. 91, War Dept. 1906; G. O. 57, War Dept. 1907; G. O. 1, War Dept. 1908. Candidates for appointment as chaplains, Cir. 24, War Dept. 1908.

member may make and sign a minority report. The reports of such boards do not become effective until they have received the sanction of the convening authority, and that authority may, if he deems any report incomplete or irregular, or that the matter requires additional investigation, return it to the board for its further action.

### BOARDS UNDER THE 54TH ARTICLE OF WAR

**531.** By the provisions of the 54th Article of War, it is made the duty of a commanding officer, upon complaint made to him, to see justice done to the offender, and reparation made to the party or parties injured by any officer or soldier under his command, from the pay of those who are guilty of abuses or disorders committed against citizens.

This not only requires the punishment of the offender by bringing him before a court-martial for trial under charges, but money reparation also.

**532.** This Article has been construed to mean reparation for injury to the property as well as to the person of the citizen. The amount of damage is assessed by a board of officers convened therefor by the commanding officer of the troops. The amount so assessed is stopped against the offenders and reparation made to the injured party. This proceeding is entirely independent of any trial or sentence of a court-martial for the criminal offense;[1] nor does the reparation made, or trial by court-martial, prevent trial by civil courts for violation of the "laws of the land."

**533. Procedure.**—The citizen aggrieved tenders a "complaint" under oath, charging the injury against a particular soldier or soldiers, described by name (if known), regiment, etc., and accompanied by evidence of the injury, and of the instrumentality of the person or persons accused.

[1] Dig. Op. J. A. G. 78, note.

If such evidence be satisfactory, the commanding officer has the damage assessed by a board and makes order for such stoppage of pay as will be sufficient for the "reparation" enjoined by the article. The commander must have a proper case presented to him; he cannot legally proceed of his own motion.[1] And when proof has been duly made that the injury has been done by some persons of a command, but the active perpetrators cannot, upon investigation, be determined, and it appears that the entire command was present and implicated, the stoppage may be legally made against all the individuals present.[2]

**534. Purpose of Stoppage.**—The pay of the offenders can be resorted to only for the purpose of "reparation." A military commander has no authority to add a further amount of stoppage as a punishment.[3]

The stoppage must be made for injuries to a citizen, not a military person; it cannot be made in favor of the United States, or to indemnify parties for property stolen or embezzled.[4]

**535.** The number of members on such a board is not prescribed by law but, usually, the commanding officer designates from three to five members, the junior being the recorder. They are not sworn, but act under their oath of office. Their report is effective when approved by the convening authority and, if damage is assessed, the commanding officer directs the amount of the stoppage to be placed upon the pay rolls of the soldiers implicated and sees that the money reparation is made to the citizen.

### SURVEYS OF PROPERTY—THE SURVEYING OFFICER

**536.** The investigation of questions relating to responsibility arising in connection with public property was form-

[1] Dig. Op. J. A. G. 84; Davis' Military Law, p. 435.
[2] Dig. Op. J. A. G. 85.
[3] Id. 82.
[4] Id. 81.

erly made by a board of officers called a "board of survey." But this board has been replaced by a single officer called the "surveying officer," who is preferably the summary court officer.

**537. Jurisdiction.**—"Surveys on property" are provided for by Army Regulations for the purpose of investigation of questions of responsibility arising in connection with the receipt, issue, distribution, use, or preservation of public property.

All public property which has been damaged, except by fair wear and tear, or is unsuitable for the service, will be surveyed by a disinterested officer, preferably the summary court officer.[1]

He may examine the contents of packages, verify their correctness, and should report the condition of stores submitted to him for examination, and fix the responsibility for damage, loss, or deficiency. He is not sworn, but acts under the sanction of his oath of office. He cannot compel the attendance of witnesses, but he has authority "to administer an oath to any witness attending to testify or depose in the course of such investigation."[2] On his recommendation, duly approved, public animals may be killed to prevent contagion or terminate suffering; and the following classes of property may be destroyed, viz.: clothing infected with contagious disease and stores that have become so deteriorated as to endanger health or injure other stores. Unserviceable property of no salable value, submitted to a surveying officer under par. 682 (A. R.), may be likewise destroyed if it is impracticable to obtain the action of an inspector on such property within a reasonable time.

This paragraph will, in its application to ordnance stores, be limited to utterly worthless articles constituting the soldier's personal equipments (not arms), horse equipments,

[1] A. R. 713. [2] A. R. 717.

and target material, the cost price of which does not exceed $100 for mounted organizations and $50 for others. In each case the report will give the dates of receipt of the stores surveyed.[1]

538. Before ordering the destruction of property or stores under this paragraph the commanding officer will personally inspect the same and will be held responsible that the conditions justify the action. In case the invoice value of the stores involved exceeds $500 the approval of the next higher commander must be obtained before destruction of the property, as provided in paragraph 722, A. R. A certificate of the witnessing officer that the property has been destroyed as authorized will be appended to the report.[1]

539. **Constitution.**—The surveying officer will be designated by the commanding officer of the regiment, separate battalion, post, or station. He may, however, be appointed by the commanding officer of a territorial division or department, an army corps, division, or brigade. If none but the commanding officer and interested officers be present for duty, then the commanding officer will survey the property. When only the responsible or interested officer is present, he will not appoint himself surveying officer, but will furnish the next higher commander his certificate of facts and circumstances, supported by testimony of witnesses, or by the affidavits of enlisted men or others who are cognizant thereof. Should the case thus presented be considered not satisfactory, or in a case in which only interested officers with opposing interests are present for duty at the post or station, the next higher commander will make the necessary investigation. In cases where the property in question has been previously acted upon, the officer making the investigation will be

[1] A. R. 720; G. O. 71, War Department, 1905; G. O. 106, War Department, 1906.

so informed and the previous reports will be considered.[1]

**540. Procedure.**—The surveying officer must fully investigate matters submitted to him. He will call for all evidence attainable, and will not limit his inquiries to proofs or statements presented by the parties in interest. He will rigidly scrutinize the evidence, especially in cases of alleged theft or embezzlement, and will not recommend the relief of officers or soldiers from responsibility unless fully satisfied that those charged with the care of the property have performed their whole duty in regard to it. He should hear in person or by deposition all persons concerned in the subject matter before him. In no case, however, will his report take the place of evidence required in paragraph 687, A. R., which is to the effect that "officers responsible for public property will be charged for any damage to or loss or destruction of the same, and the money value be deducted from their monthly pay, unless they show, to the satisfaction of the Secretary of War, by their own affidavits or certificates, supported by one or more affidavits that the damage, loss, or destruction was occasioned by unavoidable causes and without fault or neglect on their part."[2]

**541. Evidence.**—The party responsible for the property to be surveyed will, in all cases, furnish the original certificates and affidavits upon which he relies to relieve him from responsibility, together with the number of duly attested copies of such affidavits and certificates required to accompany the report of survey.[3]

**542. No Power to Condemn.**—The power of the surveying officer is restricted to a recommendation, based upon the evidence before him, as to responsibility with respect to the matters referred to him. The surveying officer cannot condemn public property; his action is

[1] A. R. 714. [2] A. R. 715. [3] A. R. 716.

purely advisory. He will ascertain and report facts concerning the matter he is directed to investigate, submitting opinions and making recommendations upon questions of responsibility which may arise through accident, mistake, or neglect.[1] The power to condemn is vested, in accordance with Sec. 1241, Revised Statutes, in officers specially designated by the Secretary of War for that purpose.

**543. Report.**—The report of the surveying officer will be prepared in triplicate and will then be submitted to the convening authority for approval or disapproval. Separate reports will be made for each staff department concerned.[2]

**544. Approval, Confirmation, etc.**—When the value of the property submitted for survey or the loss or damage to be inquired into does not exceed $500, and the interested officer does not request the next higher commander's action, the report will be considered complete, for submission as a property voucher, upon the approval of the appointing authority. One copy will then be forwarded to the post commander if a general officer, otherwise to department headquarters, and the others delivered to the officer accountable.[3]

**545.** Should the appointing authority be the responsible or interested officer, or should the report be disapproved by the appointing authority, or should the report hold the accountable officer responsible, or should the value of the property submitted for survey or the loss or damage to be inquired into exceed five hundred dollars, or should the officer pecuniarily interested request it, the report in triplicate will be forwarded to the next higher commander for review, and with his action is complete. But all reports of surveys of property, whatever their nature or the amounts involved, are subject on call to such review of the next higher commander as the merits of the case or

[1] A. R. 718. [2] A. R. 719. [3] A. R. 721.

the interests of the Government may require. When a next higher commander acts on a report of survey, as herein contemplated, he will cause such action to be noted on all three copies of the report. One copy will then be filed at department headquarters, and the others sent to the accountable officer, except when the latter is held responsible, when one copy only will be sent to him and the remaining copy forwarded directly to the chief of bureau to which the property pertains.[1]

The reports of a survey which recommend the relief of officers and enlisted men from responsibility should not be approved unless full and careful investigation and convincing proof to sustain the findings appear.[2]

**546. Survey in Case of Desertion.**—When a soldier deserts, his immediate commanding officer will at once ascertain if any public property has been lost in consequence thereof, and, if so, will proceed as in the case of property lost or destroyed, and the value of the articles lost will be charged against the deserter on the next muster rolls of his company.[3]

[1] A. R. 722; G. O. 170, War Department, 1905; G. O. 53, War Department, 1906.
[2] A. R. 723.
[3] A. R. 115.

# CHAPTER XXIX

## EVIDENCE

### RULES OF EVIDENCE APPLIED BY COURTS-MARTIAL

**547.** Courts-martial are controlled, in general, by the rules of evidence which govern United States courts in the trial of criminal cases.[1] Whenever Congress establishes a new judicature or court of justice, and does not provide, and no special reason demands, a different rule, the rules of evidence as found in the common law ought to govern its action.[2]

The rules applicable to civil courts are not strictly binding upon courts-martial, since such courts are not a part of the judiciary of the United States as organized under the Constitution, but are executive agencies for the enforcement of military discipline. They proceed by trial of military offenders, upon proper accusations referred to them therefor, and recommend suitable punishments; but their judgment is without effect until approved by that officer of the military establishment who is authorized by law to review the same.

**548.** The purpose of such courts-martial is to do justice and if the effect of a technical rule is found to exclude material facts, or otherwise obstruct a full investigation, the rule may, and should be, departed from. Proper

[1] 3 Greenleaf Ev., Sec. 476; case Cadet Whittaker, 17 Op. Atty.-Gen. 310.

[2] See Moore v. U. S., 91 U. S. 274; Simmons on Court-martial, Sec. 810.

occasions for such departure will, however, be exceptional and infrequent.[1] These courts cannot, however, compel a witness to incriminate himself, or to answer any question that may tend to incriminate or degrade him.[2]

When any departure from the rules of evidence is such that, in the opinion of the reviewing authority, injustice has been done, it will afford good ground for disapproval of the proceedings, findings, and sentence. Courts should, therefore, refrain from any departure from the established rules of evidence, except when convinced, after due consideration, of the necessity therefor to secure the ends of justice.

**549.** United States courts and courts-martial are governed by the common law rules of evidence existing and in use at the time the courts of the United States were established by the Judiciary Act of 1789, under the Constitution,[3] as since modified by statutory provisions. The United States has never adopted, by statutory provision, any system of "rules of evidence." These common law rules have, however, been adopted in practice and enforced by the decisions of the courts.

**550.** These rules have been modified, and the following are some of the modifications which affect their application by courts-martial, viz.:

*a.* An accused shall at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him.[4]

*b.* No witness shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.[5]

[1] Winthrop, Military Law, Vol. 1, p. 443.
[2] Act March 2, 1901.
[3] See Logan v. U. S., 144 U. S. 301; ante, par. 238.
[4] Act March 16, 1878.
[5] Act March 2, 1901.

## EVIDENCE

**551.** "The word 'evidence,' considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation."[1]

The law of evidence relates to its use before judicial tribunals; and it prescribes the rules which govern the admissibility of evidence and the manner in which it shall be presented to the court, the competency of witnesses; and, to a certain extent, their credibility, or the weight to be given to their testimony.

**552. Classification.**—Evidence is susceptible of several classifications. It may be divided *according to its character* into:

1st. Primary and Secondary. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is the best possible evidence of its existence and contents.

Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and its contents.

2d. Direct and Indirect. Direct evidence is that which proves the fact in dispute directly, without any inference or presumption, and which in itself, if true, conclusively establishes that fact.

Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact,

[1] Taylor, Ev., p. 1; McKelvey, Ev., p. 7, note.

but which affords an inference or presumption of its existence.[1]

**553.** Evidence may also be divided *according to its nature*, into:

1st. Circumstantial Evidence. This is proof of various facts or circumstances which usually attend the main fact in dispute, and therefore tend to prove its existence, or to sustain, by their consistency, the hypothesis claimed. It consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist.[2]

2d. Presumptive Evidence. "This consists of inferences drawn by human experience from the connection of cause and effect and observations of human conduct."

3d. *Prima Facie* Evidence. "This is that evidence which suffices for the proof of a particular fact, until contradicted and overcome by other evidence." It is evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced.

4th. Partial Evidence. "Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts."

5th. Satisfactory Evidence. "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind." Such evidence alone will justify a verdict. Evidence less than this is denominated "slight evidence."

6th. Conclusive Evidence. "Conclusive or unanswerable evidence is that which the law does not permit to be contradicted; for example, the record of a court of com-

[1] Black's Law Dictionary.
[2] People v. Kennedy, 32 N. Y. 141.

petent jurisdiction cannot be contradicted by the parties to it."

7th. Indispensable Evidence. "Indispensable evidence is that without which a particular fact cannot be proved."

8th. Documentary Evidence. "This evidence is that derived from conventional symbols (such as letters) by which ideas are represented on material substances."

9th. Hearsay Evidence. "Hearsay evidence is the evidence, not of what the witness knows himself, but of what he has heard from others." [1]

10th. Real Evidence. Real evidence is the evidence of the thing or object which is itself produced in court for the inspection of the tribunal, with proper testimony as to its identity.[2]

**554.** *With respect to its object,* evidence may also be divided into:

1st. Substantive Evidence. "Substantive evidence is that adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness (*i.e.*, showing that he is unworthy of belief), or of corroborating his testimony."

2d. Corroborative Evidence. "Corroborative evidence is additional evidence of a different character to the same point."

3d. Cumulative Evidence. "Cumulative evidence is additional evidence of the same character to the same point." [3]

## GENERAL RULES GOVERNING THE INTRODUCTION OF EVIDENCE

**555.** The general rules governing the introduction of evidence are:

[1] Black's Law Dictionary.
[2] Davis' Military Law, 263; 1 Greenl., Ev., Sec. 13*a*, note.
[3] Black's Law Dictionary.

*a.* That the evidence must correspond to the allegations, and be confined to the point in issue.

*b.* That it is sufficient if the *substance* only of the issue be proved.

*c.* That the burden of proving the proposition, or issue, lies on the party holding the affirmative.

*d.* The best evidence of which the case, in its nature, is susceptible must always be produced.[1]

### PRIMARY AND SECONDARY EVIDENCE

**556. Primary Evidence.**—Primary evidence is the original and best evidence; it affords the most direct and best proof of any fact, and must always be produced before the court if within the power of the party to produce it.

The law, however, makes some exceptions to the general rule and provides for the substitution of other evidence which shall be received with the same authority as the original.

**557.** *Public Documents.*—Public documents, as other writings, are the best evidence of their own existence and contents; but it would impede the work of the departments and interfere with the regular functions of government if the original records and documents in its care could be taken from their place of keeping and the care of their proper custodian; so that Congress has made provision for securing evidence from them by other means.

The law now provides that "copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof." [2]

In order to give full effect to the provisions of the Con-

[1] 1 Greenl., Ev., Sec. 50.

[2] Sec. 882, R. S.

stitution that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state," [1] Congress has by law provided that "the acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." [2]

Provision is also made for proof of records and exemplifications of books kept in public offices not appertaining to courts, by the attestation of the keeper of said records or books, and the seal of his office annexed, if there be a seal, together with the certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers.[3]

By these, and other similar provisions of law, documents are authenticated, in conformity with the statutes, by the seal of the office from which they issue, and the documents so attested, when certified by the designated official, are given the full value in evidence of the originals. The

[1] Constitution of United States, Art. IV, Sec. 1.
[2] Sec. 905, R. S.
[3] Sec. 906, R. S.

proper mode of proving papers on file, in any of the departments or public offices of the government, is by procuring certified copies from those persons who have them in custody.[1]

**558.** *War Department Records.*—The copies of any records or papers in the War Department or any of its bureaus, if authenticated by the impressed stamp of the bureau or office having custody of the originals, may be admitted in evidence equally with the originals thereof before any court-martial, court of inquiry, or in any administrative matter under the War Department.[2]

**559.** *Foreign Laws, Judgments, etc.*—The laws of a foreign country are not noticed by other countries unless proved as facts, and the sanction of an oath is required for their establishment unless they can be verified by some other high authority that the law respects not less than the oath of an individual.[3] The courts of one State are not presumed to know, and therefore are not bound to take judicial notice of, the laws of another State; they must be proved.[4]

**560.** Foreign laws or judgments, therefore, are authenticated:

*a.* By an exemplification under the great seal of the state.

*b.* By a copy proved, under attestation by oath, to be a true copy.

*c.* By the certificate of an officer authorized by law, which certificate must itself be properly authenticated.

If all these methods are beyond the reach of the party, other testimony, inferior in its nature, may be received.[5]

But foreign unwritten laws, customs, and usages may

[1] Barney v. Schmeider, 9 Wall (76 U. S.) 248.

[2] G. O. 91; A. G. O. 1900. This has been extended to include the headquarters of an army, corps, division, or brigade, or of a territorial division or department. (G. O. 198, War Dept. 1908.)

[3] Talbot v. Seeman, 1 Cr. (5 U. S.) 38; Church v. Hubbart; 2 Cr. (6 U. S.) 237; Ennis v. Smith, 14 How. (55 U. S.) 426.

[4] Hanley v. Donoghue, 116 U. S. 4.

[5] Church v. Hubbart, 2 Cr. (6 U. S.) 238.

be proved by persons competent, from their knowledge thereof, to testify regarding them.

**561.** *Public Records, etc.*—Proof of records, documents, etc., in charge of an official custodian thereof may be made either by the mere production of the records or by a copy thereof. Copies of records are either, (1) exemplifications, (2) office copies, copies made by an authorized officer, or, (3) sworn copies.

An exemplification is an official transcript of a document from public records, made in form to be used as evidence, and authenticated as a true copy, either under the great seal of the State, or under the seal of the particular court where the record remains.

An office copy is a copy or transcript of a deed of record, or any filed document, made by the officer having it in his custody, or under his sanction, and sealed or certified by him, and is admitted upon his credit. In the United States an officer having the legal custody of public records is, *ex officio*, competent to certify copies of their contents.

Sworn copies are examined copies which have been compared with the original or with an official record thereof. Proof of an examined copy is made by producing a witness who has compared the examined copy with the original, or with what the officer of the court, or any other person, has read as the contents of the record. But it should appear that the record was found in its proper place of deposit, or in the hands of the proper legal custodian.[1]

On general principles of law, a copy of a paper given by a public officer, whose duty it is to keep the original, ought to be received in evidence.[2]

**562.** *Private Writings.*—Private writings intended as evidence must be produced in court and identified by a proper witness or witnesses before being accepted as evidence.

[1] 1 Greenl., Ev., Sec. 500-508.

[2] U. S. v. Percheman, 7 Pet. (32 U. S.) 51. For rules with regard to the loan of original records of the War Department, army headquarters, etc., see G. O. 32, War Dept. 1909.

In court-martial cases where the writing is specifically referred to and forms part of the charges, its contents, so far as they relate to the charges, should be embodied in the specifications, which should correspond in terms with the document itself.

When it is not acknowledged by the party writing it, or who signed it, its authenticity may be shown by a subscribing witness, if any, or, if it is over thirty years old and comes from its proper custodian, it is said to prove itself. In other cases it may be proved by witnesses having knowledge of the handwriting of the party, even if only having seen him write his name once, or having seen letters or writings purported to be his, which, by his having acted thereon or acquiesced in, the witness is assured were written by the party, or which he has admitted to be genuine.

**563.** The handwriting may also be proved by a comparison made by the court-martial with writings already in evidence and admitted or proved to be genuine. In this comparison experts may be introduced by both parties to give evidence, in their opinion, according to their belief, and after examination, as to the genuineness of the handwriting. But the writings with which they are compared must already be in evidence before the court. According to the rule of the common law, evidence of handwriting by comparison of hands is inadmissible, and, therefore, cannot be admitted on a trial by court-martial, except where the writing, acknowledged to be genuine, is already in evidence in the case, or the disputed writing is an ancient document; these exceptions being allowed of necessity.[1] If a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in

[1] Case of Cadet Whittaker, 17 Op. Atty.-Gen. 310–312.

the cause, the signature or paper in question may be compared with it by the jury.[1]

**564.** Under the common law rules, therefore, which govern court-martial trials, any witness, having proper knowledge of the handwriting of a party, may declare his belief as to its genuineness; or the writing in question may be compared by the court, with aid of experts if desired, with writings already in evidence, but not with others.

**565.** *Alteration.*—If, on production of an instrument, it appears to have been altered, it is incumbent on the party offering it in evidence, or who would profit by the change, to explain this appearance. If, however, the alteration is noted in the attestation as having been made before execution of the instrument, it is sufficiently accounted for. So if it is against the interest of the party deriving title or benefit under the instrument, it is admissible. And, generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent on the face of the instrument, the law will presume nothing. The effect of a material alteration which is unexplained is to invalidate the instrument. Interlineations, erasures, or other alterations made at the time of the execution of the instrument may be made valid by the insertion of a clause explaining them, appearing over the signatures of the parties. "Any alteration which causes the instrument to speak a language different in legal effect from that which it originally spoke is a material alteration."

**566.** *Documents, how Produced.*—The production of written evidence may be voluntary, as where it is produced by a party in his own interest, or it may be compulsory,

[1] Moore v. U. S., 91 U. S. 270.

as when it is brought before the court in obedience to its order or a subpœna.

When the document is in the possession of the other party, it is secured in evidence by notice to that party to produce it before the court, and if he fails to produce it then secondary evidence may be offered as to its contents. If it is in the hands of a third party, it is produced through the *subpœna duces tecum* served upon him. If it has been lost or destroyed, or is in the hands of a person outside the jurisdiction of the court, secondary evidence of its existence and contents may be offered.

**567.** *Identification.*—When a document is introduced the burden of identifying it, and of proving that it is the best evidence attainable, rests upon the party in whose behalf it is produced.[1]

**568. Secondary Evidence.**—Where the sources of primary evidence of a written instrument are exhausted, secondary evidence is admissible,[2] and this may be oral as well as documentary.

**569.** *Oral Evidence.*—Oral evidence cannot be substituted for any instrument which the law requires to be in writing, such as records, public documents, or writings mentioned in the Statute of Frauds,[3] or in any case where

[1] Davis' El. Law, p. 80.

[2] 1 Greenl., Ev., Sec. 582.

[3] The "Statute of Frauds" is a name given to a law enacted in England in 1677 entitled "An Act for the Prevention of Frauds and Perjuries." It required certain acts, agreements, and oral contracts, which were legal under the common law, to be thereafter put in writing; thus modifying the common law practice. This law did not extend to the colonies, and was therefore not in force as a part of the legal system adopted by them when they became States; but the different States of the United States have since enacted statutes of this character.

For the United States, Congress has enacted that all contracts made on behalf of the government by the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior, or by their officers under them "shall be reduced to writing and signed by the contracting parties, with their names at the end thereof." (Sec. 3744, R. S.)

This law is mandatory, and extends not only to quartermasters and other ordinary purchasing agents, but to all officers in the War, Navy, and Interior departments, and embraces every contract made by

the law requires that evidence of the transaction be in writing. No other proof can be substituted for that, so long as the writing exists and it is within the power of the party to produce it.[1]

**570.** *Inscriptions.*—Inscriptions on walls, fixed tablets, mural monuments, gravestones, surveyor's marks, boundary trees, etc., which cannot be produced in court, may be proved by secondary or oral evidence.

**571.** *Public Officers.*—It is unnecessary to prove the written appointments of public officers; the fact being proved that they have acted as such authorizes the presumption that they have been duly appointed to office until the contrary appears.

**572.** *Voluminous Facts, etc.*—Where evidence is the result of voluminous facts, or of the inspection of many books and papers, which could not be conveniently examined in court, secondary evidence thereof may be received.

### DIRECT AND INDIRECT EVIDENCE

**573. Direct Evidence.**—Direct evidence is primary in character and the best evidence. It always bears directly upon the point in issue.

In every case the fact in issue is to be proved, either by the evidence of those who speak from their own actual or personal knowledge of its existence, or it is to be inferred from other facts satisfactorily established. In the former case the evidence of the fact itself is direct; in the latter case the evidence as to the facts testified to is direct, but the connection with the fact to be established is indirect, and the judgment formed as to the fact in question is derived from the indirect facts proved.

them. (Lindley's Case, 4 Ct. Cl. 360; Danold's Case, 5 Ct. Cl. 65; Clark v. U. S., 95 U. S. 539; South Boston Iron Co. v. U. S., 118 U. S. 37.)

[1] 1 Greenl., Ev., Sec. 84–87.

**574. Indirect Evidence.**—It is not necessary that the evidence should always be direct; any evidence that tends to prove the issue, or to constitute a link in the chain of proof, may be admitted, and under this limitation indirect evidence is admissible.

**575.** *Collateral Facts.*—Collateral facts are, as a rule, inadmissible, but exceptions have been made in which the knowledge or interest of the party was a material fact upon which the evidence, though apparently collateral, had a direct bearing and was therefore admitted.[1]

In the trial of a soldier for desertion collateral facts may be proved to show his intent which is a necessary element of the crime.

**576.** *Circumstantial Evidence.*—Evidence which is not direct and positive is indirect or circumstantial. In criminal cases circumstantial evidence is often the most convincing, but the circumstances established in evidence must be such as lead to a direct conclusion of the fact to be derived therefrom, as established beyond reasonable doubt; the truth of the fact in question and the conclusion arrived at must be established by reasonable application of the evidence.

Circumstantial evidence may also be uncertain, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by a process of reasoning; but, in criminal cases, the consequence of a wrong conclusion may be irremediable, and the court must be satisfied of a right conclusion *beyond any reasonable doubt* thereof.

**577.** *Hearsay.*—Hearsay evidence is the evidence given by a witness who relates, not what he knows or has observed personally, but what others have told him, or what he has heard said by others, and is admissible only in exceptional cases. The objections to its admissibility are

[1] 1 Greenl., Ev., Sec. 52, 53.

(1) that it is secondary, and the law requires primary evidence; (2) that the real witness is not testifying in court, under the sanction of an oath; and (3) that the opposite party, and especially the defendant in criminal cases, has no opportunity to be confronted with, or to cross-examine, the witnesses against him.[1]

Hearsay evidence is incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who speak from their own knowledge.[2]

**578.** *Exceptions.*—The rule as to the inadmissibility of hearsay testimony prevails unless such testimony constitutes (*a*) a part of the *res gestæ*, or (*b*) is admissible as dying declarations, or (*c*) as declarations made by authority of the defendant, or (*d*) as evidence given in a former proceeding.[3]

The above exceptions, which are the only ones to the general rule of inadmissibility of hearsay evidence, are allowed only on the ground of the absence of better evidence, and from the nature and necessity of the case.[4]

**579.** (*a*) *Res Gestæ.*—The things done in connection with a transaction, the facts of a transaction, are called the *res gestæ.* They are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character.

Written and verbal declarations are often admitted as constituting a part of the *res gestæ;* usually when accompanying some act the nature, motive, or object of which is the subject of inquiry. When words or writings accompany an act, or where they indicate the state of a person's bodily sufferings or feelings, they derive their credit from the surrounding circumstances and not from the bare expressions of the declarant.[5]

[1] Davis' El. Law, p. 71.
[2] Hopt v. Utah, 110 U. S. 574.
[3] Clark's Cr. Proc., p. 523.
[4] See 1 Greenl. Ev., Sec. 127.
[5] Maxwell's Cr. Proc., p. 218.

**580.** The principal points to be considered upon the question of admissibility of such evidence are as to whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration and whether they were so connected with it as to illustrate its character.[1]

Facts which are not themselves in issue, but which are part of the same transaction as the facts in issue, being part of the *res gestæ*, are admitted because they explain or qualify the facts in issue.

**581.** *Conspiracy.*—When the foundation has been laid by proof sufficient in the opinion of the court to establish *prima facie* the fact of conspiracy between the parties, or facts proper to be received as tending to establish such fact, the acts and declarations of one of a company of conspirators, in regard to the common design as affecting his fellows, may be received.[2] But acts or declarations of one conspirator, made after the conspiracy is ended, or not in furtherance of the conspiracy, are not admissible in evidence against the other conspirators.[3]

**582.** (*b*) *Dying Declarations.*—In cases of homicide where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of dying declarations, such declarations may be admitted. "The persons whose declarations are thus admitted are considered as standing in the same situation as if they were sworn; the danger of impending death being equivalent to the sanction of an oath." If the declarant, therefore, would be incompetent, if living, to testify, by reason of infamy, or other legal cause, his dying declarations are inadmissible.[4]

The declarations must, moreover, be made under the

[1] 1 Greenl. Ev., Sec. 108.
[2] Id., Sec. 111.
[3] Logan v. U. S., 144 U. S. 263.
[4] 1 Greenl. Ev., Sec. 156, 157.

sense of impending death, and declarations of the deceased are admissible only as to those things to which he would have been competent to testify if sworn in the case.[1]

The court-martial determines the question of the competency of the witness, and the weight to be given to his declarations.

**583.** (*c*) *Declarations Made by the Defendant or by His Authority.*—Declarations may be either admissions or confessions; admissions pertain to civil cases, while confessions are statements or declarations made by the accused in criminal cases. Declarations made by the defendant, or by a third party by his authority, if relevant, are admissible against him, but are not admissible in his favor.[2]

**584.** *Confessions.*—"A confession is an admission made at any time by a person charged with crime, stating, or suggesting the inference, that he committed the crime, and is admissible against him, if voluntary."

It is not voluntary "if it was caused by any inducement, threat, or promise proceeding from a person in authority, and having reference to the charge against the accused, whether addressed to him directly or brought to his knowledge indirectly, or if such inducement, threat, or promise gave the accused any reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him."

"A confession is not involuntary merely because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducement held out by a person not in authority." [3]

But the evidence of a verbal confession of guilt should be received with great caution because of the danger of mistake, through the misapprehension of the witnesses, the

[1] 1 Greenl. Ev., Sec. 159. [2] Clark's Cr. Proc., p. 527. [3] Id., p. 528.

misuse of words, the failure of the party to express his own meaning, the infirmity of memory, and the condition of mind of the accused.[1] The official character of the person to whom the confession is made does not affect its admissibility, provided no inducements were employed; but confessions made by private soldiers to officers or non-commissioned officers, though not shown to have been made under the influence of promise or threat, should yet, in view of the military relations of the parties, be received with caution.[2]

**585.** A confession, if fully and voluntarily made, is evidence of the most satisfactory character. While from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate and voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in the confession.[3]

But the presumption on which weight to such evidence is based, namely, that an innocent person will not imperil his safety or interests by an untrue statement, ceases when the confession appears to have been made in consequence of inducements of a temporal nature, held out by one in authority, or because of a threat or promise by, or in the presence of, such person, which, operating upon the fears or hopes of the accused in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary, within the meaning of the law.[4]

**586.** The true test of the admissibility in evidence of a confession of a person on trial for the commission of a

[1] 1 Greenl. Ev., Sec. 214.
[2] Dig. Op. J. A. G. 1299, note 1.
[3] 1 Greenl. Ev., Sec. 215; Starkie, Ev., p. 73; Hopt v. Utah, 110 U. S. 584, 585.
[4] Hopt v. Utah, 110 U. S. 585.

crime is that it was made freely, voluntarily, and without compulsion or inducement.[1]

The most common form of confession is the plea of guilty in open court. This does not exclude the admission of evidence by courts-martial, and the testimony of witnesses is usually taken in such cases where the character of the offense is such as to make the degree of punishment to be awarded a question for the court to determine.

**587.** *Treason.*—The Constitution provides that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."[2] But it has been held that this restriction does not apply to preliminary hearings and commitment[3] or to show intent.[4] The provisions of the Constitution are conditions precedent for the establishment of the prisoner's guilt, and until the overt act is proven by two witnesses, or until there is confession made in open court, corroborative or confirmatory evidence cannot be introduced. But after the provisions of the Constitution are satisfied, corroborative evidence, such as a confession not made in open court, is admissible.[4]

**588.** (*d*) *Evidence Given in a Former Proceeding.*—Evidence given in a former proceeding is admissible for the purpose of proving the matter stated in a subsequent proceeding or in a later stage of the same proceeding, under the following circumstances, viz.:

(*a*) When the witness is dead, (*b*) or insane, (*c*) or so ill that he will probably never be able to travel, or (*d*) when he is kept out of the way by the adverse party: *Provided*, That the person against whom the evidence is to be given had the right and opportunity to cross-examine the wit-

[1] Wilson v. U. S., 162 U. S. 613.
[2] Art. 3, Sec. 3, Cl. 1.
[3] U. S. v. Greiner, 4 Phila. 396; Gould and Tucker, Notes, Revised Statutes, Vol. 1, p. 999.
[4] Am. and Eng. Enc. of Law, 2d Ed., Vol. 28, p. 468.

ness in the former proceeding; that the questions in issue were substantially the same in the first as in the second proceeding; and that the same person is accused upon the same facts.[1]

**589. Opinion Evidence.**—The opinion of a person that a fact in issue or relevant to the issue does or does not exist is admissible only in exceptional cases. The opinions of witnesses are, in general, not evidence. Yet, on certain classes of subjects, any competent witness may express his opinion or belief. Thus the testimony of a witness as to his belief in the identity of a person, or as to his handwriting, if he has knowledge of it, may be given.

"Any intelligent witness may testify as to opinions which are in themselves conclusions drawn from numerous facts within the daily observation and experience of all intelligent persons. Such relate to the appearance or demeanor of a person; his sanity, sobriety, identity, or his resemblance to another; his physical condition, whether sick or well; his condition as regards emotion or passion, as to anger, hope or fear, joy or sorrow, excitement or coolness, and the like. These are matters of every-day occurrence as to which all thoughtful persons are competent to testify in a proper case."[2]

"The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence."[3]

"The statement of a non-professional witness, as to the sanity or insanity, at a particular time, of an individual, whose appearance, manner, habits, and conduct came under his personal observation, is not the expression of

[1] Clark's Crim. Proc., p 532.
[2] Davis' Military Law, pp. 261–2.
[3] McKelvey on Ev., Sec. 124.

mere opinion. In form, it is an opinion, because it expresses an inference or conclusion. But in a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual, as sane or insane, is a fact, and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact." [1]

**590. Experts.**—The opinion of experts in any science, art, trade, or profession in which they have attained special proficiency may, at the discretion of the court, and under its direction, be given in evidence.[2] Before an alleged expert, however, is allowed to give his opinion, the court must be satisfied that his skill in the matter upon which his opinion is to be given in evidence is sufficient to entitle him to be considered an expert. The expert not knowing anything of the particular case, facts may be stated hypothetically and he be asked to state his opinion assuming those facts to be true. Facts not otherwise relevant are admissible if they support or if they are inconsistent with the opinions given by experts.[3]

The employment of experts before a court-martial is within the legal and proper discretion of the Secretary of War.[4]

**591. Character.**—Evidence of character is admissible to show (*a*) that the accused bears a good character as tending to prove that it is not probable that he would commit the crime he is charged with, and to strengthen the presumption of innocence; (*b*) in prosecutions for homicide the character of the deceased as a violent and dangerous man may be shown, on the question as to whether the accused acted in self-defense.

But the prosecution cannot show that the accused has a

[1] Conn. Mutual Life Ins. Co. v. Lathrop, 111 U. S. 620.
[2] Davis' Military Law, p. 262.
[3] Clark's Cr. Proc., p. 536; see Sec. 234, supra.
[4] In re Wm. Smith, 24 Ct. Cl. 209.

bad character, unless his character itself is a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.[1]

**592.** In trials before military courts, evidence of the good character, record, and services of the accused as an officer or soldier may be introduced in all cases where the sentence is mandatory as well as those where it is discretionary, not only for the purpose of influencing favorably the judgment of the court-martial but in order that it may be a basis of a recommendation to clemency by members of the court, or induce favorable action by the reviewing authority whose approval is necessary to the execution of the sentence.[2] When such evidence is introduced by the accused the prosecution may then produce counter-testimony.

### JUDICIAL NOTICE [3]

**593.** Courts will recognize the existence and truth of certain facts bearing upon the matter in issue before them, of their own motion and without requiring the production of evidence; such acceptance of these facts is known as "taking judicial notice" of them.

These facts are accepted either because the law makes it the duty of the court to know them, or because they are recognized to be of such universal notoriety as to leave no room for dispute about them.

**594.** The first class embraces:

*a.* All the public laws by which the court is bound to be controlled in rendering its decisions.[4]

[1] Clark's Cr. Proc., pp. 536–537.
[2] Davis' Military Law, p. 266.
[3] See Reynolds on Evidence, 2d Ed., pp. 64–73.
[4] They include the Constitution, public statutes, and treaties of the United States; the Constitution and public laws of the State in which the court is sitting; the law of nations; law merchant; the common law and its statutory modifications, so far as they constitute a part

*b.* Matters of public interest which, being recognized, established, or determined by the law of the land, must be considered to be within the knowledge of all persons, and especially those holding public position under the government, and thereby constituting a part of it.[1]

of the law of the land; the rules and regulations prescribed by departments of government (Caha v. U. S., 152 U. S. 212). They do not, however, take judicial notice of the laws of a foreign country, nor of the laws of another State; nor do courts judicially notice private acts of legislation, nor the various orders issued by a military commander in the exercise of the authority conferred upon him (Burke v. Miltenberger, 19 Wall. [86 U. S.] 519), though they may take notice of his official character. Foreign laws must be proved like other facts, verified by oath, or by equally high authority. The certificate of a consul of the United States, under his seal, is not sufficient. (Church v. Hubbart, 2 Cr. [6 U. S.] 187; Dainese v. Hale, 91 U. S. 13; Lloyd v. Matthews, 155 U. S. 222.)

[1] In the United States this class has been held to include:

1. The existence and titles of all sovereign powers of the civilized world, recognized by the government of the United States, their respective flags and seals of state; the public acts and proclamations and the public authorized agents of such powers in carrying their treaties with the United States into effect.

2. Foreign admiralty and maritime courts, notaries, and their respective seals.

3. The sittings of Congress and of the Legislature of the State or Territory where the court is held, their established and usual mode of procedure, the privileges of members, and, in some cases, the transactions recorded on their journals.

4. The accession of the Chief Executive of the Nation, and of the State or Territory in which the court is held; his powers and privileges, and his signature; the heads of departments and principal officers of state; the persons at the head of or presiding over bureaus of the departments of government; the public seals; the election or resignation of a Senator of the United States; the appointment of a cabinet or foreign ministers; the existence of all courts of the United States and all courts of general jurisdiction in the State or Territory where the court is held, and the extent of their jurisdiction; also the existence, jurisdiction, and practice of its inferior courts in so far as established by law; the judges and seals of all such courts and their terms so far as regulated by public law, but not their rules of court; the United States Marshals, Sheriffs, United States and State District Attorneys, and Clerks of Court, and the genuineness of their respective signatures, but not those of their deputies.

5. Public proclamations of war and peace and of days of special public feasts and thanksgiving; stated days of general political elections; the legal coinage, weights and measures of the country; the territorial extent of the jurisdiction and sovereignty exercised *de facto* by the United States and the State in which the court sits, and the local political divisions of the State into counties, etc., and their relative positions, but not precise boundaries further than described in public statutes; the public surveys and legal subdivisions under the public

*c.* Matters peculiarly within the knowledge of the particular court, as its records, its officers and their deputies, its attorneys, and the signatures of such officers, deputies, and attorneys, in all their official or professional acts.

*d.* Matters which the courts are specially directed by statute to notice judicially.

*e.* Matters which take place in the actual presence of the court.

**595.** The second class of facts judicially noticed embraces all matters so notorious as to be fairly considered to be within the common knowledge or experience of all persons of ordinary intelligence and education.[1]

**596.** If the court is uncertain as to any fact which it is

law; and the courts of the United States take special notice of the ports and waters of the United States where the tide ebbs and flows, and of the boundaries of the several States and judicial districts.

[1] This class has been held to include:

*a.* The general geographical features of the country or State, the existence and location of its principal mountains, rivers, and cities, and also the geographical position and distances of foreign countries and cities, so far as they are matters of universal notoriety, and of geographical facts. (U. S. v. La Vengeance, 3 Dall. [3 U. S.] 297.)

*b.* Matters of public history affecting the whole people, and public matters affecting the national government or that of the State, district, or county where the court is held; the existence of wars, the closing of courts, and the substitution of military authority; and the cessation of war. (Wharton, Ev., Vol. 1, Sec. 338.)

*c.* Things which have happened in the ordinary course of nature, as the ordinary limitation of human life as to age, the course of time and the heavenly bodies, the mutations of the seasons, and their relation to the maturity of crops.

*d.* The ordinary public feasts and festivals; the coincidence of the days of the week with the days of the month.

*e.* The meaning of words in the vernacular language, but not of catchwords, technical, local, or slang expressions.

*f.* Ordinary abbreviations universally understood, such as abbreviations of Christian names and the like, but not those in any degree doubtful or difficult of interpretation.

*g.* The character of the general circulating medium, currency, etc., of the country and the public language in reference to it. (Reynolds on Evidence, pp. 66–74.)

There is no rule of law, or practice, requiring civil courts to take notice of orders issued by a military commander in the exercise of the authority conferred upon him, though the fact of military occupation of territory might be so noticed. (Burke v. Miltenberger, 19 Wall. [86 U. S.] 519, 526.)

called upon to notice judicially it may refer to any person, or to any document or book of reference, to satisfy itself with regard thereto, or it may refuse to take judicial notice of the fact, unless and until the party calling upon it to do so shall produce such document or book of reference.

**597.** The court will also take notice of facts expressly admitted by the parties either in the pleadings or at the hearing of the case. But in prosecution for murder, courts will not ordinarily permit a conviction upon the mere confession of the prisoner, without some corroborative evidence, either direct or circumstantial, of the actual commission of the crime.[1] The *corpus delicti*,[2] the fact that the crime has actually been committed, must be shown before there can be conviction, even after confession.

### PRESUMPTIONS

**598.** "A 'presumption' is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved." [3]

Presumptions are of two classes: Presumptions of Law and Presumptions of Fact.

**Presumptions of Law.**—A "presumption of law" means "a rule of law that courts and juries shall draw a particular inference from a particular circumstance." [4] They consist of those rules which, in certain cases, either forbid or dispense with any ulterior inquiry.[5]

[1] Reynolds on Evidence, p. 74.

[2] By *corpus delicti* is meant the essential substance, in law, of the offense charged. It consists of two things: first, the existence of the act or result forming the basis of a criminal charge; and, secondly, the existence of a criminal agency as the cause of this act or result. For example, in the case of a felonious homicide, the death of the person killed must be proved, and also the fact of the existence of a criminal agency as the cause of the death. (Am. and Eng. Encyc. of Law, Vol. 7, p. 861.)

[3] Lawson on Presumptive Ev., p. 555; Stephen, Dig. Ev., p. 2.

[4] Lawson on Presumptive Ev., p. 555.

[5] 1 Greenl. Ev., Sec. 14.

Presumptions of law are classed as either "conclusive" or "disputable."

**599. Conclusive Presumptions.**—Conclusive, or absolute, presumptions of law are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise, and, therefore, all corroborating evidence is dispensed with and all opposing evidence is forbidden.[1]

These rules are sometimes declared in statutes, or through the medium of judicial tribunals, as being the common law of the land.

**600.** Among these presumptions of law are the following:

That a sane man contemplates the natural and probable consequences of his own acts; if a man kills another with a deadly weapon it is a presumption of law that he intended his death; in favor of judicial proceedings and the correctness of the records of a court of justice, and that ancient documents, deeds and wills more than thirty years old, and unblemished by alterations, prove themselves; that infants under seven years of age are incapable of committing a crime; and that a wife acting in company with her husband in the commission of a felony, other than murder, treason, or robbery, acts under his coercion, and consequently without guilty intent. But this last presumption has been weakened by recent decisions,[2] and is now classed by some writers among the disputable presumptions.

**601. Estoppel.**—Estoppel may be classed in this rank of presumptions.[3] Estoppel is a preclusion in law, which prevents a man from alleging or denying a fact in consequence of his own previous act, allegation or denial to the

[1] 1 Greenl. Ev., Sec. 15.
[2] Id., Sec. 28, note *d*.
[3] Id., Sec. 22.

contrary.[1] A man is said to be estopped when he has done some act which the policy of the law will not permit him to gainsay or deny; it forbids his questioning the legality of an act which he has sanctioned either by words or conduct to the prejudice of those who have given faith to his words or to the fair inference to be drawn from his conduct. The words or conduct must have misled the other party, and the element of fraud is essential in order to operate as an estoppel. There may be an estoppel by deed, as in the case of a sealed instrument; or of record, as when it appears in the pleadings in an action at law.[2]

**602. Disputable Presumptions.**—Disputable presumptions are those which establish a *prima facie* case, but which may be overcome by opposing proof.

Of this class are the following: the presumption of innocence in criminal cases; that men follow the usual conduct in the course of trade; that solemn instruments have been duly executed; in favor of the regularity of the conduct of business in a public office; in favor of the permanency and continuance of the existence of persons, personal relations, or a state of things once established by proof, and against change; in favor of the sanity of a person; that an infant between seven and fourteen years of age is incapable of committing crime, in such case the burden of proof to show capacity lies with the prosecution; that the possession of personal property is *prima facie* evidence of ownership; that a child born during wedlock is legitimate; in favor of regularity and legality. Public officers are presumed to have complied with the laws governing them in the performance of their duties;[3] a duly attested record by proper authority is presumed to be

[1] Stephen, Pl., p. 197.
[2] Davis' El. Law, p. 89.
[3] Cofield v. McClelland, 83 U. S. 331-335, Mitchell v. U. S., 9 Pet. (34 U. S.) 711; U. S. v. Peralta, 19 How. (60 U. S.) 343.

correct;[1] and proof of usage creates a presumption in favor of its continuance.[2]

**603. Presumptions of Fact.**—"A presumption of fact is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved." It must be based upon a fact and not upon inference or upon another presumption, and cannot contradict facts or overcome facts proved.[3]

Presumptions of fact are "merely natural presumptions derived wholly and directly from the circumstances of a particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever."[4] They are inferences drawn from other facts and circumstances in the case, and should be made upon the common principles of induction; for example, "A letter is mailed to a party at a place where he usually receives his letters and transacts his business. There is no presumption of law that he received it. A presumption of fact that he did may, however, be drawn."[5]

The facts upon which the presumption as to the existence of any particular fact is based, in a particular case, must be derived from the evidence submitted; and to justify a court-martial in reaching a conclusion in respect to the guilt of an accused person, where the evidence is circumstantial, the facts from which it is inferred must not only be consistent with the theory of guilt, but must be irreconcilable with any reasonable theory as to his innocence.[6]

### BURDEN OF PROOF

**604.** The Burden of Proof is the duty of proving the facts in dispute in an issue raised between the parties in a

[1] Ferguson v. Harwood, 7 Cr. (11 U. S.) 408.
[2] Dunlop v. U. S., 165 U. S. 486.
[3] Lawson on Presumptive Ev., p. 555 et seq.
[4] 1 Greenl. Ev., Sec. 44.
[5] Lawson on Presumptive Ev., pp. 556, 560.
[6] Davis' Military Law, p. 298.

cause. It is one of the rules governing the production of evidence that "the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue." [1]

**How Determined.**—In civil actions the issues referred to a jury for trial are decided by a preponderance of proof. But in every criminal case—which is the class of cases that come before a court-martial—the accused is presumed to be innocent, and the burden of proof necessary to establish his guilt "beyond reasonable doubt" is upon the prosecution.

A "reasonable doubt," within the meaning of this rule, is not a mere imaginary, captious, or possible doubt but a fair doubt, based on reason and common sense, and growing out of the testimony in the case. It is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction to a moral certainty of the defendant's guilt.[2] "It is an honest, substantial misgiving generated by the insufficiency of proof; not a doubt suggested by the ingenuity of counsel or jury, unwarranted by the testimony, nor one born of a merciful inclination to permit the prisoner to escape, nor one prompted by sympathy for him or those connected with him;[3] it is not a fanciful conjecture which an imaginative man may conjure up, but a doubt which reasonably flows from the evidence or want of evidence; a doubt for which a sensible man could give a good reason, which reason must be based upon the evidence or want of evidence; such a doubt as a sensible man would act upon in his own concerns." [4]

**605.** In criminal cases the state always has the affirmative, and whatever the defense, or theory of defense, ad-

[1] 1 Greenl. Ev., Sec. 74.
[2] Clark's Cr. Proc., p. 539.
[3] U. S. v. Harper, 33 Fed. Rep. 471.
[4] Id., Davis' Military Law, p. 141; Hopt v. Utah, 120 U. S. 430, 439.

vanced by the accused may be, its position never changes, and hence the burden of establishing a case never shifts, but remains always with the state.[1] Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.[2] But when a *prima facie* case has been made out, the necessity of adducing evidence then devolves on the accused.[3]

"The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial according to the nature and strength of the proofs offered in support or denial of the main fact to be established." [4] The burden of proof does not shift. The duty of introducing evidence to make or meet a *prima facie* case may shift from time to time as the trial proceeds, but the burden of proof as correctly understood, that is, the duty which rests upon a party who asserts the affirmative of an issue or proposition of establishing it by a preponderance of evidence, or beyond a reasonable doubt, as the case may be, never shifts during the course of a trial, but remains with him until the end.[4]

**606.** "In collateral issues arising in the course of the trial as to the competency of witnesses, the admissibility of testimony, and the like, the burden of proof rests upon

[1] Am. and Eng. Enc. Law, 2d Ed., Vol. 5, p 33; Agnew v. U. S., 165 U. S. 37; U. S. v. Gooding, 12 Wheat. (25 U. S.) 460.
[2] Davis v. U. S., 160 U. S. 487.
[3] Agnew v. U. S., 165 U. S. 37.
[4] Am. and Eng. Enc. of Law, 2d Ed., Vol. 5, p. 22, note 1, and p. 30; Central Bridge Corp. v. Butler, 2 Gray (Mass.) 132.

the party who alleges incompetency or objects to the admission of particular testimony." [1]

RELEVANCY, ETC.

**607.** In the trial of any case testimony offered may be objected to on the ground that it is irrelevant, immaterial, improper, and inadmissible under the rules of evidence.

The word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other.[2]

Facts which are not themselves directly in issue but which tend to establish the existence or non-existence of the fact in issue, or of any fact relevant thereto, are relevant and may be admitted in evidence; also the *res gestæ*, or facts forming a part of the same transaction, or the statements accompanying an act; also the fact of the existence of an ordinary course of business, or usual method of transaction thereof, are admissible.

Proof of facts which would be the natural or probable cause or result of the existence or non-existence of facts in issue, declarations as to bodily or mental feelings which are simultaneous with the doing of the act, facts showing animus, similar occurrences showing intention, subsequent conduct, in criminal cases, are admissible, and facts may be shown which explain relevant facts.[3]

**608.** Evidence offered to show facts which are not material to the issue, having no effect upon the matter before the court, and those which are improper to be introduced, such as those with reference to the character of the accused

[1] Davis' Military Law, p. 267.
[2] Stephen, Dig. Ev., Art. 2–9.
[3] Reynolds on Ev., Sec. 7–11.

before he himself has brought it in question, and all that which is inadmissible under the rules of evidence, may be objected to by either party; and in all cases where such objection is made, the question of admission is determined by the court. If the objection is sustained, such testimony is excluded. Courts-martial, however, are usually very liberal in the construction of the rules of evidence in favor of the accused, giving him the benefit of any doubt.

**609.** Evidence is sometimes introduced which does not seem relevant at that time, but which may be admitted upon the declaration of the party that its relevancy will be made to appear later in the trial. If its relevancy is not so made to appear as stated, that which has been received will be thrown out and not considered by the court.

### COMPETENCY AND CREDIBILITY OF WITNESSES

**610.** The competency of a witness is his legal ability to testify, and this, being a question of law, is determined by the judge. The credibility of a witness is his worthiness of belief and is a question of fact to be determined by the jury from the general manner of the witness in giving evidence, his relation to the matter in issue, his appearance, prejudices, etc., and by comparison of his evidence with that of others, and then giving it its proper weight.

**611.** Courts-martial, combining the functions of both judge and jury, act upon both competency and credibility.

**612.** The law, on the ground of public policy, presumes that all witnesses tendered in a court of justice are not only competent but credible. All persons are presumed to be competent unil the contrary is affirmatively shown. The burden of proof to show incompetency is on the objecting party.[1] If a witness is pronounced incompetent he is not allowed to testify.

[1] Wharton, Ev., Sec. 392, 393.

**613.** Objection to competency should be made before the witness takes the oath, and before his examination-in-chief if the ground therefor be known to the objecting party; if discovered during such examination-in-chief it must be made before the cross-examination.[1]

**614. Grounds of Incompetency.**—The principal grounds of incompetency at common law are (*a*) want of religious belief, (*b*) infamy, (*c*) want of mental capacity, (*d*) interest, (*e*) being husband and wife. All these are grounds for objection for incompetency in the courts of the United States, except as the common law rules of evidence concerning them have been modified by statute.

**615.** *a. Want of Religious Belief.*—It is essential, in order to ascertain the truth, that a witness be under some moral obligation to tell it, and that some responsibility attach to him if he fails to do so. Under the common law, atheists and all persons who are wanting in religious belief and profess no religion that can bind their conscience to speak the truth are rejected as incompetent.[2] The witness must believe in the existence of a God who will reward or punish him, and it has been held sufficient that he believes that this will happen in this world although he does not believe in a future state. But it is not sufficient that he believes himself bound to speak the truth, merely for regard to character, or the interests of society, or fear of punishment by the temporal law.[3]

There is unanimity of opinion in the decisions of the various courts of the United States that the witness must believe in the existence of a God who will punish falsehood.[4] The objections to the competency of a witness to

[1] Wharton, Ev., Sec. 393.
[2] 1 Greenl. Ev., Sec. 368; Starkie, Ev., pp. 116, 29, note; Davis' El. Law, pp. 68, 69. Some States, however, have abolished, by statute law, incompetency from lack of religious belief (1 Greenl. Ev., Sec. 368, note *a*).
[3] Starkie, Ev., p. 116.
[4] Id., p. 29, note. See 1 Greenl. Ev., Sec. 369, note.

testify, on the ground of "want of religious belief," as existing under the common law, are being modified by the statutes of different States; the question of admissibility in such cases being looked upon as one which is not so much as to the capacity of a witness to take an oath as it is concerning his possession of that moral sense which induces truth-telling.[1]

Courts-martial not being held strictly to the rules of evidence, in their effort to get at the truth of the matter before them,[2] must decide in each case of objection to the admissibility of a witness on the ground of want of religious belief whether, according to the circumstances of the case, the witness shall be excluded or not, and, if admitted, as to the degree of credibility to be attached to his testimony.

The form of oath, in civil trials, is not essential, and the witness may be sworn in that form which he deems most binding and obligatory, but once having been sworn in that form, or in any other form which he permits, without objection on his part, he becomes responsible and may be prosecuted for perjury if his testimony be wilfully false.[3]

In trials by court-martial, the oath or affirmation being prescribed by the statute[4] (Art. 92) for all persons who give evidence before such courts, this form of oath must be administered; but the solemn attestation, or act, which makes it binding upon the conscience of the witness, may be in any form which the witness declares is in accordance with his religious tenets or belief.[5]

**616.** *b. Infamy.*—At common law persons convicted of crimes which render them infamous are excluded from being witnesses. An "infamous" crime in this sense is

[1] See Wigmore on Ev., Vol. 3, Sec. 1815 et seq.
[2] See ante, par. 547, 548.
[3] 1 Greenl. Ev., Sec. 371; Reynolds on Ev., Sec. 96.
[4] See Art. 92, post, par. 799.
[5] Davis' Military Law, p. 517; 1 Greenl. Ev., Sec. 371; Winthrop, Vol. 1, p. 400.

regarded as comprehending *treason, felony,* and *crimen falsi.*[1] Treason is defined by the Constitution of the United States[2] as consisting only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort; felony, under the common law, was an offense punishable capitally, or with forfeiture of land and goods, and a person convicted of such an offense became infamous and forfeited a number of civil rights, and among them the capacity to testify, as a witness, in a court of justice.[3] Imprisonment in a State prison or penitentiary, with or without hard labor, is considered infamous punishment, and a person sentenced to such punishment has the status of a felon. All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.[4]

PARDON

**617.** The full pardon of a convict, even after having served his sentence, or a reversal of the judgment, restores his competency to testify.[5] But where the disability is not a consequence of the judgment but grows out of the character of the crime itself, as perjury, and it is annexed to the conviction of a crime by the express words of a statute, the pardon will not, in such cases, restore the competency of the offender; the prerogative of the sovereign being controlled by the authority of the express law.[6] "The punishment of crime belongs to the criminal code;

[1] Wharton, Ev., Sec. 397.
[2] Art. 3, Sec. 3, Cl. 1. See Sec. 1, Act March 4, 1909, 35 St. L. 1088.
[3] Davis' Military Law, pp. 252, 253.
[4] Id., p. 253; Mackin v. U. S., 117 U. S. 348–253; Ex parte Wilson, 114 U. S. 417; Sec. 335, Act March 4, 1909, 35 St. L. 1152.
[5] Logan v. U. S., 144 U. S. 263; Boyd v. U. S., 142 U. S. 450.
[6] 1 Greenl. Ev., Sec. 378 and notes.

the rule of evidence to the civil." In cases of perjury, the exclusion being under a law relating to the introduction of evidence, the pardon does not affect the law in this respect.

**618.** The incompetency from infamy must be established by the production of the judgment itself; "the record is the sole evidence of guilt, no other proof being admitted of the crime." [1] Persons convicted of an infamous crime in one State are not incompetent, unless by express statute, to testify as a witness in the courts of another State, or of the United States.[2] Such convictions, however, may be established in evidence with a view to affect the credibility of the witness.[3]

### CRIMEN FALSI

**619.** *Crimen falsi* is any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. The offenses included under this head are forgery, perjury, subornation of perjury, suppression of testimony by bribery, or conspiracy to accuse one of a crime, or to procure the absence of a witness, and barratry. The *crimen falsi* of the common law, therefore, not only involves the charge of falsehood, but is also one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud into judicial proceedings.[4]

**620.** *c. Want of Mental Capacity.*—Want of mental capacity may arise from defect of understanding through infancy, insanity, intoxication, or disease of any kind. "While the deficiency of understanding exists, be the

[1] 1 Greenl. Ev., Sec. 372.
[2] Davis' Military Law, p. 254; Logan v. U. S., 144 U. S. 264.
[3] Davis' Military Law, p. 254.
[4] 1 Greenl. Ev., Sec. 373; Wigmore on Ev., Vol. 1, Sec. 520.

cause of what nature soever, the person is not admissible to be sworn as a witness." [1]

INFANCY

**621.** The admissibility of the evidence of infants is not limited by their age but depends upon their intelligence, and of this the court judges. There is no precise age that determines the competency of an infant. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the truth.[2]

INSANITY

**622.** Insane persons who are incapable of understanding at the time of the commission of the act in question, or at the time of testifying, are incompetent. But if the act occurred during a lucid interval and the witness has since been cured, or the testimony is given during a lucid interval, his competency is restored. "A person affected with insanity is admissible as a witness, if it appears to the court, upon examining him and competent witnesses, that he has sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions in issue." [3] It is no objection to the competency or credibility of a witness that he is subject to fits of derangement, if he be sane at the time of giving his testimony.[4] An idiot, being a person without understanding, is incompetent as a witness.

**623.** Deaf and dumb persons may testify by writing, or signs, by means of an interpreter, in open court, and this is accepted as oral evidence.[5]

[1] 1 Greenl. Ev., Sec. 365.
[2] Wheeler v. U. S., 159 U. S. 523, 524.
[3] Dist. of Columbia v. Armes, 107 U. S. 519.
[4] Evans v. Hettich, 7 Wheat. (20 U. S.) 453.
[5] Clark's Cr. Proc., p. 542; 1 Greenl. Ev., Sec. 366.

INTOXICATION

**624.** A witness prevented by drunkenness, or any other cause, from recollecting the matter in issue, or unable to understand the questions put to him, or to give rational answers thereto, or from comprehending that he must speak the truth, or to testify, is incompetent and may be excluded or the examination be postponed until he is sober.[1] If the witness was drunk at the time of the event his credibility may be impeached by evidence thereof; and a like rule applies to all others laboring under disability to testify from any similar cause.

**625.** *d. Interest.*—The interest which disqualifies in common law must be a "*legal interest*" in the event, as contradistinguished from affection, prejudice, or bias.[2] It must be a direct and certain interest in the event of the cause, or an interest in the record for the purpose of evidence. "The true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain, and vested interest, and not an interest uncertain, remote, or contingent." [3]

A person having an interest only in the question, and not in the event of the suit, is a competent witness.[4] This doctrine of disqualification for interest is applied in criminal cases where the witness has a direct, certain, and immediate interest in the result of the prosecution.[5]

Any witness may testify against his own interest.[6]

[1] Wharton, Ev., Sec. 418.
[2] Starkie, Ev., p. 23.
[3] 1 Greenl. Ev., Sec. 390.
[4] Evans v. Eaton, 7 Wheat. (20 U. S.) 356; Potter v. Nat'l Bank, 102 U. S. 163.
[5] Davis' Military Law, p. 255.
[6] 1 Greenl. Ev., Sec. 410.

### THE ACCUSED AS A WITNESS

**626.** The accused has been given competency as a witness by a statute which provides that "in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." [1] An accused who waives his constitutional privilege of silence by voluntarily becoming a witness in his own behalf places himself in the same status as any other witness, and may be cross-examined with the same latitude as would be exercised in the case of an ordinary witness as to the circumstances connecting him with the alleged crime.[2] His testimony is not excepted from the ordinary rules governing the introduction of evidence, nor from the application of the usual tests of cross-examination, rebuttal, etc., but he cannot be compelled, against his objection, to criminate himself,[3] or to answer questions which will tend to incriminate or degrade him.[4] He is subject to impeachment.[5] And if he has been previously convicted of infamy he will not be permitted to testify.[6]

### ACCOMPLICES

**627.** "A *particeps criminis*, or accomplice, notwithstanding the turpitude of his conduct, is not, on that account, an incompetent witness, so long as he remains

[1] Act March 16, 1878.
[2] Fitzpatrick v. U. S., 178 U. S. 304.
[3] Dig. Op. J. A. G. 1300.
[4] Act March 2, 1901.
[5] Fitzpatrick v. U. S., 178 U. S. 316. See ante, par. 262–264.
[6] U. S. v. Hollis, 43 Fed. Rep. 248.

not convicted and sentenced for an infamous crime." [1] The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury.[2] And though it is the settled practice, in cases of felony, to require other evidence in corroboration of that of an accomplice, yet the manner and extent of this corroboration is undetermined.[3] But it should be sufficient to satisfy the court "beyond reasonable doubt." Two or more accomplices produced as witnesses do not corroborate each other, but the same rule applies, and the same corroboration is required, as if there were but one.[4] The fact that offenders have been tried and convicted as accomplices in a civil court is not evidence that they are accomplices in a trial by court-martial for a military offense involved in the same act, the military responsibility being entirely distinct from the civil.

### PRIVILEGED COMMUNICATIONS

**628.** The term "privileged communications" is used to designate a class of evidence which, while relevant to the matter in issue, is made inadmissible by law, or which it is the privilege of the witness to decline to answer. Such communications are those relating to matters occurring during certain confidential relations which it is the policy of the law to protect.

**629. Husband and Wife.**—At common law, in any criminal proceeding the husband or wife cannot be compelled to give evidence for or against each other, even in an accusation of treason,[5] except in cases of personal violence committed the one upon the other, in which case the necessities of justice compel the relaxation of the rule,

[1] 1 Greenl. Ev., Sec. 379.
[2] Id. Sec. 380.
[3] Id., Sec. 381.
[4] U. S. v. Hinz, 35 Fed. Rep. 272.
[5] 1 Greenl. Ev., Sec. 345.

and either may testify.[1] This is for the reason that such evidence would compel a violation of confidence which is regarded as sacred, and its breach as contrary to public policy. The wife of a person on trial before a court-martial cannot properly be admitted as a witness for or against him; and the statute authorizing accused parties to testify does not affect this rule.[2]

If objection is made on the ground of such relationship the burden of proof is on the party objecting, to show a valid marriage.[3]

The death of the husband does not weaken the principle; a widow is incompetent to testify, in a suit which she is neither a party to, nor interested in, to a private conversation held with her husband during his lifetime.[4]

The wife of an officer or soldier may be admitted to testify in his case before a court of inquiry, its functions not being to try the case, but to investigate it.[5]

**630. Other Confidential Communications.**—There are other confidential communications arising from personal or official relations which are also excluded from being given in evidence, by public policy. Communications made to public officers, or grand jurors, with a view to criminal prosecution, including statements of persons engaged in the discovery of crime; the deliberations of courts and of certain bodies, like grand and petit juries, and boards of arbitration, the results of which, only, may be made public; the transactions of legislative committees, and deliberations of legislative bodies in closed session; diplomatic correspondence and communications between the principal officers of the several executive departments, on matters of public business, together with the proceedings of commissions, courts-martial, and courts of inquiry, their acts,

[1] Graves v. U. S., 150 U. S. 118; Bassett v. U. S., 137 U. S. 505.
[2] Dig. Op. J. A. G. 2462.
[3] Wharton, Sec. 421.
[4] Hopkins v. Grimshaw, 165 U. S. 342.
[5] Davis' Military Law, p. 258.

discussions, and deliberations while in closed session, and the record thereof, until published by proper authority; and, generally, all oral or written communications in which the production of documents or oral disclosures of any kind is restrained by law or would, in the opinion of the Executive, be detrimental to the public interests. Private telegrams in the hands of an operator are not privileged communications.[1]

**631. State Secrets.**—The Executive of the Nation or of a State and the heads of departments of government are privileged, in the exercise of their discretion, to determine how far they will produce papers or answer questions as to public affairs in a judicial inquiry; but this privilege cannot be claimed by a subordinate, nor applied to communications which, though made to an official person, are not made in the discharge of public duty.[2]

**632. Attorney and Client.**—It being essential to the ends of justice that the fullest confidence exist between an accused and his attorney, the law excludes testimony of the attorney as to all communications between him and his client, made while that relation exists;[3] and this rule includes the clerk, interpreter, stenographer, agent, or other employee necessary to the attorney in the transaction of his business. But it is the privilege of the client alone, and, if he voluntarily waives it, it cannot be insisted upon to close the mouth of the attorney.[4]

**633.** This common law privilege does not extend, however, to clergymen, physicians, or others;[5] such privilege can only be extended by statute, as has already been done in several States.

[1] Davis' El. Law, pp. 83, 84; 1 Greenl. Ev., Sec. 251; Wharton, Cr. Ev., Sec. 509 et seq. See Wigmore on Ev., Vol. 4, Sec. 2375, 2287.

[2] Starkie, Ev., Sec. 41; Wharton, Cr. Ev., Sec. 513. See Wigmore on Ev., Vol. 4, Sec. 2367–2376.

[3] Alexander v. U. S., 138 U. S. 353; Conn. Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457.

[4] Hunt v. Blackburn, 128 U. S. 464.

[5] Starkie, Ev., Sec. 40; 1 Greenl. Ev., Sec. 247, 248. See Wigmore on Ev., Vol. 4, Sec. 2380–2396.

INCRIMINATING EVIDENCE

**634.** The Constitution provides that no person "shall be compelled, in any criminal case, to be a witness against himself." [1] And Congress has provided relative to persons subpœnaed to appear before courts-martial that "no witness shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him." [2] A liberal construction is to be placed upon the constitutional provisions for the protection of personal rights.[3]

**635.** Section 860, Rev. Stat. U. S., which provides that "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying aforesaid," [4] has no application to court-martial trials.

"The principle of the Fifth Amendment to the Constitution, but not the Amendment itself, applies to court-martial trials as a part of our common law military." Section 860, Rev. Stat., does not apply to courts-martial and it does not, therefore, set aside the general principle which, with courts-martial, takes the place of the constitutional provision,[5] and an accused on trial before a court-martial is not obliged, when testifying as a witness in his own

[1] Amendments to Constitution of United States, Art. V.
[2] Act March 2, 1901.
[3] Counselman v. Hitchcock, 142 U. S. 547; Boyd v. U. S., 116 U. S. 616.
[4] Sec. 860, R. S. See Boyd v. U. S., 116 U. S. 632.
[5] Dig. Op. J. A. G. 1020.

behalf, to answer questions where he states that his answers thereto might tend to criminate him. The Constitution does not limit the privilege of silence of a witness to criminal cases against himself; its provision is that no person shall be compelled in *any* criminal case to be a witness against himself. "No statute which leaves the party or witness subject to prosecution, after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution." Such statutory enactments, "to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." [1] If a statute does afford immunity against future prosecution, as when it is barred by the statute of limitations, the witness will be compellable to testify; [2] and the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good.[3]

**636.** The objection that it will incriminate or degrade him must be made by the witness himself under oath, and cannot be made by his counsel, or a party to the proceeding. The court cannot compel a witness, not having immunity from prosecution, to answer a question which manifestly and clearly tends to criminate him. If the court should compel him to answer a question deemed proper by it, the answer thereto, if it should prove criminating, cannot be given in evidence against him. A refusal to answer a proper question put upon cross-examination is a proper subject of comment to the jury.[4]

**637.** "Where a military witness declines to answer a question on the ground that it is of such a character that the answer thereto may criminate him, but the court de-

[1] Counselman v. Hitchcock, 142 U. S. 548, 585, 586; U. S. v. Kimball, 117 Fed. Rep. 156; Foot v. Buchanan, 113 Fed. Rep. 156.
[2] Brown v. Walker, 161 U. S. 591, 598.
[3] Id. 606.
[4] Fitzpatrick v. U. S., 178 U. S. 316.

cides that the question is not one of this nature and that it must be answered, the witness cannot properly refuse to respond, and if he does so, will render himself liable to charges and trial under the 62d Article of War." [1]

**638.** The privilege being for the protection of the witness, he may waive it, but once having elected to do so he is not permitted to stop, but must go on and make a full disclosure.[2]

### IMPEACHMENT

**639.** The testimony of a witness having been concluded may be impeached in four ways:[3]

1. By disproving, by the testimony of other witnesses, any facts stated by him which are material to the issues on trial.

2. By proof of his having made statements out of court inconsistent with his testimony; provided that the foundation therefor has first been laid by interrogating the witness about such contradictory statements. This is done by asking him on cross-examination whether he has not made any former statement as to some fact relative to the subject matter of the action, inconsistent with his present testimony, and, if he does not admit it, proof may be given that he did in fact make it. "It is a general rule that whenever the credit of a witness is to be impeached by proof of something that he has said, or declared, or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said, or declared, or done, that which is intended to be proved," and that his attention be called to the particular time and occasion when, the place where, and the person to whom he made

[1] Dig. Op. J. A. G. 2474.
[2] Brown v. Walker, 161 U. S. 597; Dig. Op. J. A. G. 2474.
[3] Reynolds on Ev., Sec 106.

the varying statements;[1] and if the statements are in writing, they must first be shown to the witness.[2]

3. By proof of any facts showing bias or prejudice on the part of the witness in favor of the party by whom he was called, or against the opposite party, as relationship, sympathy, or interest in the matter in controversy or in the event of the suit; or proof of the witness having been convicted of any infamous crime, in cases where such conviction would not render him incompetent to testify.

4. By general evidence affecting his character for veracity.

**640.** A party cannot impeach the credit of his own witness further than by contradicting his testimony as to any particular facts by the testimony of other competent witnesses.[3]

**641.** The first two methods are pursued by means of the cross-examination, and contradiction by other witnesses whose testimony is unimpeachable.

The third method is attained through proof of the particular facts tending to show bias, prejudice, etc., and, in case of infamy, proof of conviction of an infamous crime, which proof must, under the common law, always be made by the production of a copy of the record of the judgment of his conviction.[4]

The fourth method of impeaching the credit of a witness is by the testimony of other witnesses that they know his general reputation for truth and veracity in the community where he lives, and that such reputation is bad.

**642.** In the United States courts, and in those of most of the States, the question to impeach the witness is re-

[1] Starkie, Ev., p. 238; Mattox v. U. S., 156 U. S. 237; Ch., M. & St P. R. R. v. Artery, 137 U. S. 507; Ayers v. Watson, 132 U. S. 394.
[2] Wharton, Ev., Sec. 555.
[3] Reynolds on Evidence, Sec. 106; Dravo v. Fabel, 132 U. S. 487; St. Clair v. U. S., 154 U. S. 134; Hickory v. U. S., 151 U. S. 303.
[4] Reynolds on Ev., Sec. 107.

stricted to his general reputation for truth and veracity; it cannot extend to general moral character or to particular facts or transactions.[1] But in English courts, and in those of some States, the rule permits evidence as to general moral character, and having testified that the reputation of the witness who is being impeached is bad, the witness on the stand may be asked whether, from that reputation, he would believe him under oath.[2]

**643.** A party whose witness is being impeached may bring witnesses to his good reputation in order to sustain his credit.[3]

EXAMINATION AND CROSS-EXAMINATION

**644. Direct Examination:** *Leading Questions.*—Questions on direct examination must be pertinent to the issue, or to facts relevant thereto. Leading questions, such as suggest the answer which the person putting them wishes or expects to receive, or which suggest disputed facts as to which the witness is to testify, must not be asked on direct examination if objected to by the adverse party, except with permission of the court.[4] But questions which are merely introductory in character, or asked for the purpose of identification, or to assist defective memory, and questions asked of a witness who seems to be hostile to the party introducing him, are exceptions to this rule.[5]

Questions are objectionable as leading which, embodying a material fact, admit of an answer by a simple negative or affirmative, or which suggest the specific answer desired.[6] An interrogatory must not assume facts to have

[1] Reynolds on Ev., Sec. 108; Teese v. Huntingdon, 23 How. (64 U. S.) 2, 11; 1 Greenl Ev., Sec. 461.
[2] Starkie, Ev., p. 238; Wharton, Ev., Sec. 565.
[3] Wharton, Ev., Sec. 569; Starkie, Ev., pp. 252, 253.
[4] Reynolds on Ev., Sec. 99.
[5] Davis' El. Law, p. 83; Wharton, Ev., Sec. 498–502; Starkie, Ev., pp. 166, 170; 1 Greenl. Ev., Sec. 435–438.
[6] Wigmore on Ev., Sec. 769.

been proved which have not been proved; nor that particular answers have been given which have not been given.[1]

But on cross-examination leading questions may be asked.[2] The cross-examination must, however, be confined to the facts and circumstances connected with the matter stated in the direct examination of the witness, and to questions tending to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character; and the witness may be compelled to answer any such question however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, if, in the opinion of the court, such question be material to affect the credibility of his testimony, and unless it be such that the answer might tend to render the witness liable to criminal prosecution, penalty, or forfeiture.[3]

While the above is the general rule governing civil courts, a court-martial cannot compel a witness to answer any question which may tend to incriminate or degrade him.[4]

**645.** If the adverse party desires to examine the witness as to matters not stated in his direct examination, he must do so by making the witness his own and calling him to the stand, as such, in the subsequent progress of the cause.[5]

**646.** When the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are largely subject to the control of the court, in the exercise of a sound discretion, and the exercise of that discretion is not reviewable on a writ of error.[6]

[1] 1 Greenl. Ev., Sec. 434.
[2] Reynolds on Ev., Sec. 101; Davis' El. Law, p. 83.
[3] Reynolds on Ev., Sec. 101.
[4] Act March 2, 1901. See Appendix C.
[5] Houghton v. Jones, 1 Wall. (68 U. S.) 702; Phila. & Trenton R. R. v. Stimpson, 14 Pet. (39 U. S.) 448, 461; 1 Greenl. Ev., Sec. 445.
[6] Davis v. Coblens, 174 U. S. 719; N. P. R. R. v. Urlin, 158 U. S. 272; Johnston v. Jones, 1 Bl. (66 U. S.) 210.

**647.** A greater latitude is allowable in the cross-examination of a party who places himself upon the stand than in that of other witnesses.[1]

**648.** A witness who has been examined and cross-examined may, within the discretion of the court, be recalled to make some change in the statements made by him on cross-examination.[2]

### AFFIRMATIVE AND NEGATIVE EVIDENCE

**649.** It is a rule of evidence that, ordinarily, a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative, because the latter may have forgotten what actually occurred, while it is impossible to remember what never existed.[3]

### THE SUBSTANCE OF ISSUE TO BE PROVED; VARIANCE

**650.** The substance of the issue only need be proved; but matters of description must be proved as charged. In general, allegations of time, place, quantity, quality, and values, when not descriptive of the identity of the subject of the action, need not be proved strictly as alleged. If a man is charged with stealing ten dollars in money and the evidence shows that it was but five dollars, the substance of the issue—the fact of the theft—being proved, is sufficient; but if he is charged with stealing ten dollars in gold coin and the evidence shows that it was paper currency, there is a difference in the matter of description between the allegation and the proof, and this constitutes a variance which is fatal in a matter essential to the charge.

[1] Rea v. Mo., 17 Wall. (84 U. S.) 532.
[2] Faust v. U. S., 163 U. S. 452.
[3] Stitt v. Huidekopers, 17 Wall. (84 U. S.) 384.

### MOTIVE

**651.** Any fact that shows a motive to commit the crime, or preparation by the defendant for the act charged, and any conduct or condition of the defendant subsequent to the act charged, apparently influenced or caused by its doing, and any act done in consequence of it, by him or by his authority, may be shown; and when an act has been proved, statements accompanying and explaining the act, made by or to the person doing it, may be proved, if they are necessary to understand it.[1] But upon an indictment for conspiracy acts and declarations of one conspirator, made after the conspiracy has ended, or not in the furtherance of the conspiracy, are not admissible in evidence against the other conspirators.[2]

[1] Clark's Cr. Proc., Sec. 196–200.
[2] Logan v. U. S., 144 U. S. 263.

# CHAPTER XXX

## THE LAWS OF WAR

### MILITARY GOVERNMENT; MARTIAL LAW; THE MILITARY COMMISSION [1]

**652. The Laws of War.**—In time of war, or of insurrection or rebellion when armed forces are in the field, or in domestic disturbances where civil authority is powerless to enforce the laws, through uprising or forcible opposition, and the armed forces of the United States are called into operation to restore the civil power and to protect the people, the commander of those forces possesses powers, and acts under an authority, not possessed by him, or which he is not authorized by law to exercise, during time of peace and order. Some of these extraordinary powers, are conferred by statute, such as the power to convene courts-martial for the trial and punishment of persons in the military service guilty of the certain crimes enumerated in the 58th Article of War. But the larger part of his authority is derived from the recognized customs and usages of war, called the "laws of war," which are accepted as binding upon all civilized nations, and as belonging to, and being a part of, "international law." The laws of war are, therefore, treated of in works on "international law." [2]

[1] For a full discussion of the rights, duties, and obligations of officers under Military Government and Martial Law, and the origin and powers of the Military Commission, see Birkhimer's Military Government and Martial Law, 2d Ed.

[2] See Davis, G. B., International Law, Chap. X.

**653.** *General Order 100.*—In the United States, certain rules, embodying the principles of the "laws of war," were prepared by Dr. Francis Lieber, revised by a board of officers, duly approved, and promulgated as "Instructions for the Government of the Armies of the United States in the Field," by General Order No. 100, Adjutant-General's Office, U. S. Army, in 1863. These instructions were also issued, without modification, for the government of the Armies of the United States during the war with Spain in 1898.[1] This order has since been modified, and republished in the "Field Service Regulations, 1905."

**654.** The existence of war at once dissolves all friendly relations between the countries at war, between each of such countries and the individuals of the other country, and between the citizens of each. The states which engage in war are called "belligerents" and acquire certain rights called "belligerent rights," and have certain duties and obligations toward each other, and toward other nations not engaged in the war, who are called "neutrals." Each citizen of one belligerent country is legally, though not actually, an enemy of the other, and of its citizens. There is a general rule of non-intercourse,[2] and no relation whatever can exist outside the necessary communications between the belligerents as authorized by the laws of war, except in particular cases under authority given by their government.

The rights of individuals are suspended whenever necessity exists therefor, in the interest of the welfare of the nation. Private property may be taken or destroyed, if the exigency of war demands it, within the sound discretion of any commander; but if the exigency does not demand it, and there is no justification, under the circumstances, for such action, the officer taking or destroy-

[1] Davis, G. B., International Law, Appendix A.
[2] Jecker v. Montgomery, 18 How. (59 U. S.) 110.

ing such property may be held personally responsible by a military court for misconduct if the property is that of an enemy or of a citizen of his own country, and also, in the latter case, the legality of his acts may be inquired into by the civil courts of his country; and he cannot justify himself for an unlawful act by producing the order of a superior officer, if such order be illegal. The order may palliate but it can never justify.[1] But any action against such officer must be before the courts of his own country. An officer serving in the enemy's country is not liable to an action in the courts of that country for injuries resulting from his military orders or acts; nor can he be required by a civil tribunal thereof to justify or explain them upon any allegation that they were not justified by military necessity. He is subject to the laws of war, and amenable only to his own government.[2]

**655.** For property destroyed in the exigencies of warfare, or in operations of armies in the field, or in measures necessary for the safety and efficiency of its armies, as property destroyed in battle, bombardments, construction of necessary field works, etc., neither the government nor the officer is responsible.

**656.** The acts of commanders and of the armies of modern nations toward each other, and in the government of occupied territory, and their relations as enemies opposed in warfare, are governed not only by the unwritten usages and customs of war of civilized nations, and, for our Army, by General Order 100, of 1863, as modified in 1905, but by certain international agreements binding upon all nations signatory thereto, such as those of the Declaration of Paris, in 1856; and of St. Petersburg, in 1868; the Geneva Convention for the amelioration of the condition of the sick and wounded, of 1864, amended in

[1] Mitchell v. Harmony, 13 How. (54 U. S.) 115; Beckwith v. Bean, 98 U. S. 303; see post, par. 665.
[2] Dow v. Johnson, 100 U. S. 158.

1868; the Peace Conference at The Hague in 1899, and the Geneva Convention of July 6, 1906.[1]

These regulate conditions of warfare on sea and on land. They provide for the care of the sick and wounded, and of prisoners, and their exchange; forbid the use of poison or poisoned arms, or weapons causing unnecessary pain, the killing or wounding by treachery, or of a disabled or surrendered enemy, the refusal to give quarter, the unlawful use of flags of truce or the national flag, or of insignia or uniforms, the attack of places unfortified and not defended; they prohibit pillage, and the destruction of property except when imperatively demanded by the exigencies of war. They provide for the protection of public buildings such as churches, libraries, museums, etc., for the treatment of spies and their preliminary trial before punishment, the treatment of the inhabitants of an occupied territory, and the relations of the belligerents to each other and to neutrals. Non-combatants, persons not in arms, are entitled to protection, but "guerrillas," persons acting singly or in bands, without the authority of their government, are not entitled to the protection of the laws of war.

**657.** The right of a belligerent to levy contributions or money exactions can be exercised only by the general-in-chief, and only during actual occupation and the existence of war, and no reimbursement therefor is required.

**658.** Requisitions may be made, in accordance with the laws, regulations, and orders governing them, by commanders of any grade, for necessary supplies, receipts being given for the property thus taken; and reimbursement therefor depends upon the invaders' government.[2]

**659.** Property in occupied territory, though belonging to private individuals, may be seized or destroyed, though

[1] This Convention, when duly ratified, supersedes, as between the states signatory thereto, the Convention of 1864.

[2] Davis, G. B., Int. Law, pp. 307. 308.

the owner thereof may have a just claim for indemnity;[1] but the emergency requiring it must be shown to exist.[2]

### MILITARY GOVERNMENT

**660.** In connection with the conduct of war, either in a foreign country or in domestic territory in case of insurrection or rebellion of such proportion that the opponents of the government are recognized as belligerents, there may be occasion for the military commander to occupy and govern conquered territory, and to administer a form of government supplanting that of the other belligerent. Such occupation and administration is called the government of military occupation, or "military government." This derives its authority from, and is controlled solely by, the laws of war.

**661.** The commander of the occupying forces, under those laws, unites in himself, as the representative of the executive power of his nation, all the functions of government, legislative, executive, and judicial; and his will is, for the time, supreme in all occupied territory, except as controlled by the laws of war, those of his own government, and the executive power thereof.

**662.** His authority over that territory begins with the fact of its military occupation and the consequent suspension of the authority of the former government.

The conquering authority has the right to displace the pre-existing authority, and to assume, to such extent as it may deem proper, the exercise by itself of all the functions and powers of government. "It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war . . . the laws of war then take the place of the

[1] Dow v. Johnson, 100 U. S. 167.
[2] U. S. v. Russell, 13 Wall. (80 U. S.) 624, 629.

Constitution and laws of the United States as applied in time of peace." [1]

The true test of military occupation is exclusive possession, when the invader dominates the territory to the exclusion of the former and regular government.[2]

**663.** The rule of the commander may be either civil or military in character, or partly one and partly the other.[3] He may continue in force any or all of the laws of the country, suspend or modify them, add thereto, or make new laws; and he may continue the officials in office or appoint others to administer the laws.

**664.** Unless suspended or superseded by him, the ordinary municipal laws continue in force, and may be administered by the ordinary tribunals, exercising their ordinary jurisdiction for the protection and benefit of the inhabitants themselves, and of persons not in the military service, in their relations to each other; but persons in the military service are not amenable thereto for acts done in the performance of their military duty.[4] When the ordinary courts are closed by the exigency of war, the military commander may establish special courts or judges for the determination of cases not cognizable by the ordinary military tribunals. Such courts were established during the Civil War and called "provost" courts. They not only tried cases of breaches of the peace and violation of civil ordinances or of military regulations established for the government of the locality, but, in some instances, took cognizance of important civil actions, and their authority to do so has been affirmed by the Supreme

[1] New Orleans v. Steamship Co., 20 Wall. (87 U. S.) 394; Winthrop's Abr., 2d Ed., p. 324.
[2] Birkhimer's Military Government and Martial Law, Sec. 34.
[3] Id., Sec. 113.
[4] Dow v. Johnson, 100 U. S. 158; Coleman v. Tenn., 97 U. S. 509. See Birkhimer's Military Government and Martial Law, Chap. IX; Dig. Op. J. A. G. 1576, and note.

Court of the United States.[1] Such courts are sometimes called "provisional" courts.

**665.** The military commander may restrain by confinement, and, in extreme cases, summarily punish persons guilty of violations of the laws of war, hostile demonstrations, or public disorders.[2]

But summary punishment should, unless the military commander can justify his action, under the exigencies of the particular case, in departing from the rule, be carried out only after due trial by a military commission, which is the recognized tribunal for the trial of offenses against the laws of war.

If the commander exceeds his powers under those laws, he is amenable only to his own government, which may disavow his acts and make due reparation therefor, holding him responsible to its own authority; or it may assume the responsibility for the acts, in which case it becomes a question for settlement between the two interested governments.[3]

When a military commander, appointed by and representing the United States during its temporary occupation of a territory after the conclusion of peace, pursuant to a treaty, acting in his official capacity commits a tort against any individual in the course of the civil administration of affairs of the territory, he is not exempt from personal liability. If an officer of the United States takes the property of a private person for public use without compensation, he is liable in tort for the trespass, although the government may also be liable on an implied contract.[4]

But if such act, constituting the tort, is originally au-

[1] Mechanics' and Traders' Bank v. Union Bank, 22 Wall. (89 U. S.) 276; Dig. Op. J. A. G. 1577, and note.
[2] Winthrop's Abr., 2d Ed., p. 327.
[3] Birkhimer's Military Government and Martial Law, Sec. 309.
[4] O'Reilly de Camara v. Brooke, 135 Fed. Rep. 384.

thorized and directed by the United States government, that government, and not the military commander, is responsible; and a subsequent ratification by the government of an official act of its officer is equivalent to an original authorization, and exempts the military commander from personal liability.[1]

**666.** The presumption always is that the commander has made proper use of his authority. "An honest exercise of discretion in the performance of his military duty will not render him liable to be treated as a trespasser. No officer who is given a discretion in the performance of his public duties is punishable because his judgment differs from that of others. The question is: Did he use his discretion reasonably, and honestly intend to do his duty? If so, and the subject matter for determination be within his discretion, he cannot be held responsible because, in the light of subsequent events, that judgment was at fault." [2]

**667.** The military government established in a conquered territory continues after peace is made, until Congress has legislated otherwise and made needful rules and regulations respecting the territory and property belonging to the United States.[3]

### MARTIAL LAW [4]

**668.** Martial Law is the term which has been used to designate military rule of any kind outside and beyond those laws which govern the military establishment. It differs, however, from "military government," in that in

[1] O'Reilly de Camara v. Brooke, 142 Fed. Rep. 858; Id. 209 U. S. 45.
[2] Birkhimer's Military Government and Martial Law, Sec. 322; Dinsman v. Wilkes, 12 How. (53 U. S.) 402; Jecker v. Montgomery, 18 How. (59 U. S.) 123.
[3] Cross v. Harrison, 16 How. (57 U. S.) 164; Downes v. Bidwell, 182 U. S. 244.
[4] See ante, par. 5, 6.

such government the military power is exercised "by a belligerent by virtue of his occupation of an enemy's territory, over such territory and its inhabitants." [1]

**669.** In our service Martial Law, as set forth by the authority of the War Department, is regarded in two phases, viz.: (*a*) Martial Law applied to the Army; (*b*) Martial Law at Home (or as a domestic fact).[2]

**670.** Martial law applied to the Army is "military power extending in time of war, insurrection, or rebellion over persons in the military service, as to obligations arising out of such emergency and not falling within the domain of military law, nor otherwise regulated by law." [3]

In this phase, being the law applicable to the Army and to persons in the military service during the existence of war, it exists, so far as it relates to them and their rights, duties, and obligations, during military government; while that government itself is a measure of hostility established especially for the government of inhabitants of the occupied territory, outside of the laws governing the military establishment, being solely the will of the commander exercised under the laws of war and with responsibility to his own government.

The rights, duties, and obligations of that commander, and of the Army at large, toward the inhabitants of occupied territory are regulated by the laws of war, and "martial law" is, therefore, a part of those laws.

**671.** Martial law at home (or as a domestic fact) is "military power exercised in time of war, insurrection, or rebellion, in parts of the country retaining their allegiance, and over persons and things not ordinarily subjected to it." [4]

[1] Court-martial Manual, p. 5.
[2] Id.; Justification of Martial Law, Lieber, North Amer. Rev., 1896, War Dept. Doc. No. 79, p. 3.
[3] Id.
[4] Id.

It results only from the existence of a public exigency and a compelling necessity for military control. This condition exists when the ordinary administration of the laws fails to secure the proper objects of government and the civil authority is, through necessity therefor, replaced by, and, for the time being, is subordinate to the military.

The exercise of this phase of martial law affects our own laws and citizens, and is dominant military rule springing out of necessity and exercised under ultimate military and civil responsibility.[1]

Martial law is not provided for by the Constitution. It is founded on necessity, attendant on the fact of war. It is more than the military power acting merely in aid of the civil power. It is in fact "a species of hostilities directed against individuals who have placed themselves in the position of enemies, and have therefore deprived themselves of all the safeguards which the Constitution throws about the lives, liberty, and property of citizens." [2] When opposition to the laws of the United States amounts to war, there will be a justification for martial law in the locality of the war or where it is necessary.[3]

When martial law prevails, the civil power is superseded by the military power; the military power becomes supreme; the safeguards of the Bill of Rights of the Constitution are for the time being set aside,[4] and the civilian may be tried by military commission. When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land. But when the

[1] Birkhimer's Military Government and Martial Law, 2d Ed., Sec. 436.
[2] Pomeroy, Const. Law, 7th. Ed., Sec. 711.
[3] Lieber, Use of the Army in Aid of the Civil Power; Dig. Op. J. A. G., p. 786.
[4] New Orleans v. Steamship Co., 20 Wall. (87 U S.) 394; Magoon's Reports, p. 12.

military power is acting under the Constitution in aid of the civil power, and the opposition to law is not of such a character that war exists, the civil power is still supreme, and the rule of war cannot be applied.[1]

**672. When Martial Law Exists.**—Martial law exists only when the civil authority is unable to enforce the laws and it becomes necessary to substitute for it the military power of the executive for the preservation of order, the enforcement of laws, and the restoration of civil authority to an undisturbed exercise of its usual functions. Its declaration is only the statement of existing facts, that military authority is about to take the place of civil government, and notice of the necessity therefor.

It can come into existence, without such necessity, neither by a declaration of Congress nor of the President. It arises only from necessity, the right of self-preservation of constitutional government, and may be necessary even for the safety of the Constitution itself, and is superior to all other law while the necessity exists.[2]

**673. Declaration.**—It originates in supreme necessity, but, the necessity once established, the fact of its existence may be proclaimed by the executive authority, who alone is judge of that necessity, entrusted with the conduct of the war, and responsible for its successful prosecution.[3]

In exercising military power to the prejudice of private

[1] Lieber, Use of the Army in Aid of the Civil Power; Dig. Op. J. A. G., p. 786.

[2] It is to be noted that Congress, by Act of April 30, 1900, has authorized the Governor of Hawaii to call upon the commanders of the military and naval forces of the United States in the Territory, or the militia of the Territory, to prevent or suppress lawless violence, invasion, insurrection, or rebellion, and in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, to suspend the privilege of the writ of *habeas corpus*, or place that Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon be made known.

[3] Birkhimer's Military Government and Martial Law, 2d Ed., Sec. 369; Moyer v. Peabody, 148 Fed. Rep. 870.

rights, there must be reasonable ground for believing the danger to be immediate and impending, or the necessity urgent for the public service.[1]

**674. Effect of Declaration.**—The effect of the declaration of martial law is to suspend, within the territory named, all law except the will of the military commander, which he is to exercise according to his best judgment and the exigencies of the moment, under a sense of future responsibility to civil authority for unjust or arbitrary action. The power of the officer cannot be exercised for purposes of oppression, or wilful injury to person or property.[2]

The existence of martial law does not necessarily exclude all civil functions; the courts may continue their operation sustained by the presence and power of the military, and under its authority. "Supreme military authority in a city is not incompatible with the existence and authority of courts of civil jurisdiction and procedure there";[3] and their judgments and decrees are binding on all parties subject to their jurisdiction.[4]

After martial law has been proclaimed by proper authority, officers engaged in the military service may lawfully arrest any one, who, they have reasonable ground to believe, was engaged in insurrection or rebellion, and may forcibly enter and search premises, where it is reasonable to suppose that such offenders are secreted.[5]

**675. Responsibility of Officer.**—A military commander honestly exercising his judgment, with reasonable grounds for believing that the necessity exists for enforcing martial law, cannot be held liable for what is done under it in

[1] See Mitchell v. Harmony, 13 How. (54 U. S.) 134.
[2] Luther v. Borden, 7 How. (48 U. S.) 1; In re Fagan, 5 Blatch. 320.
[3] Pepin v. Lachenmeyer, 45 N. Y. 27.
[4] Kneval v. Taylor, 2 Wood 27; Coleman v. Tenn., 97 U. S. 509.
[5] Birkhimer's Military Government and Martial Law, Sec. 637; Luther v. Borden, 7 How. (48 U. S.) 46.

accordance with military usage.[1] But the power should never be pushed beyond what the exigency requires.[2] And if he acts from malice, or vindictive feeling, or disposition to oppress, he is liable therefor.[3]

**676. Territorial Limitation.**—Where it exists as a consequence of war, martial law is confined to the locality of actual war. It can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction.[4]

**677. When Martial Law Ceases.**—Martial law ceases with the necessity for its existence. "As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power." [5]

**678.** The proclamation required by Sec. 5300, Revised Statutes, to be made in cases of domestic violence, unlawful combinations, etc., commanding the insurgents to disperse and retire to their respective abodes, is not a proclamation of martial law, but a statutory requirement; though it may be followed by a declaration of martial law if it fails to have the effect of restoring order and civil authority.

### HABEAS CORPUS AND MARTIAL LAW

**679.** The effect of a declaration of martial law is to suspend for the time the privilege of the writ of *habeas corpus*.[6] The rule of martial law is practically a state of war, it exists by virtue of necessity which supersedes all other law.[7]

[1] Birkhimer's Military Government and Martial Law, Sec. 631; Dinsman v. Wilkes, 12 How. (53 U. S.) 403.
[2] Raymond v. Thomas, 91 U. S. 716.
[3] Dinsman v. Wilkes, 12 How. (53 U. S.) 404.
[4] Ex parte Milligan, 4 Wall. (71 U. S.) 127.
[5] Id.
[6] Cooley, Prin. Const. Law, p. 290; Winthrop's Abr., 2d Ed., p. 330.
[7] Finlason, Com. on Martial Law, pp. 127, 128.

The power to suspend the privilege of the writ of *habeas corpus* is included in the power to declare martial law.[1] "When martial law prevails, the civil power is superseded by the military power, and the ordinary safeguards to individual rights are for the time being set aside; but it is incumbent on those who administer it to act in accordance with the principles of justice, honor, humanity, and the laws and usages of war." [2]

**680.** The condition being one where the civil power is suspended, the Executive governs by military force, and such government is, for the time being, the will of the commander which is the supreme law. Any use of judicial power, to interfere with his action in the performance of his legitimate duties, would prevent the very object of his presence, overturn his authority, and retard the restoration of order and civil power, which is the object of his rule. The power to suspend the privilege of the writ has been held to be a legislative power and cannot, therefore, be exercised by the Executive; yet the declaration of martial law, and the consequent suspension of the writ by the President, is not an assumption of, or an interference with, the legislative power, for the reason that all such powers, and all civil laws, are for the time being suspended because of the necessity which has demanded the action, of the military power of the Executive, taken to protect and restore them.

The suspension of the writ by the President included in the declaration of martial law is not, therefore, a suspension in the exact meaning of the term as used in the Constitution and as construed by the courts, but is an act due to "necessity," and is in accordance with the constitutional authority of the Executive "to preserve, protect, and

[1] Dig. Op. J. A. G. 1639; Id. 1643, note; 9 Am. Law Rev. 507–8; Ex parte Field, 5 Blatch. 82; Bishop's New Criminal Law, Vol. 1, Sec. 60–65, and notes.

[2] Dig. Op. J. A. G. 1644.

defend the Constitution of the United States," and to "take care that the laws be faithfully executed (Const., Art. II, Sec. 3). His action is taken in an emergency and under a necessity to preserve the Constitution and laws. In case of an extended war, however, Congress would undoubtedly, as it did in the Civil War, vest authority to suspend the writ in the President by the passage of an act to that effect. While, therefore, it is held that the power to suspend the privilege of the writ of *habeas corpus* can only be exercised by Congress, it is believed that this rules applies to that period when civil authority and judicial functions are in power, and not to a period when they are temporarily suspended, or only exercised under martial law. The suspension of the privilege of the writ, in such case, is due to, and the effect of, the existence of such an uprising and opposition to civil authority as renders martial law a necessity, and does not result, and cannot result, from any specific declaration of its suspension made by the Executive; such a declaration being a power belonging to Congress.[1] In case of public danger, at once so imminent and grave as to admit of no other remedy, the maxim *salus populi suprema lex* should form the rule of action, and even should the executive and military authorities of the United States suspend the privileges of the writ of *habeas corpus*, their action would then be justified by the pressure of a visible public necessity; if an act of indemnity were required, it would be the duty of Congress to pass it. But if the President should exercise, or should authorize others to exercise, this power improperly, or unnecessarily, he would be liable to impeachment.[2]

The responsibility of the commander, as to all that fol-

[1] Flanders, Const. Law, 5th Ed., Sec. 229; Cooley, Prin. Const. Law, p. 289.

[2] Halleck, International Law, p. 380; 8 Op. Atty.-Gen. 365 et seq.

lows the declaration of martial law, includes also responsibility for the suspension of the privilege of the writ as well as for his other acts. Should he be held responsible by civil authority after peace is restored, Congress has the power to indemnify him, as it did General Jackson, who, for refusal to obey the writ of a judge in 1814-1815, in New Orleans, was, after peace was declared, fined $1000, which he paid, and for which Congress afterward reimbursed him.

The power of Congress extends to the passage of laws indemnifying or protecting officers against action for arrest previously made.[1] Indemnity acts were passed after the Civil War for the protection of officers from prosecution for acts done in the line of duty during the war.[2] And as the President is authorized by Sec. 5299, Revised Statutes United States, "to take such measures as may be necessary to suppress insurrection, domestic violence, or unlawful combinations," which hinder the execution of the laws or deprive any portion or class of people of their civil rights under the Constitution, this may be construed to include the power to suspend the privilege of the writ of *habeas corpus* in such cases, although the section in the Act of April 20, 1871, from which Act this section is taken, specifically granting him such power, was omitted from the Revised Statutes.[3]

**681.** The suspension of the privilege of the writ does not suspend the writ itself, nor does it authorize the arrest of any one, but simply denies to one arrested the privilege of the writ in order to gain his liberty. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of

[1] McCall v. McDonald, 1 Abb. (U. S.) 212.

[2] See Birkhimer's Military Government and Martial Law, Chap. XXIX.

[3] Congress, by Act of April 30, 1900, has authorized the Governor of Hawaii to suspend the writ of *habeas corpus* in certain emergencies. See ante, par. 672, note.

proceeding any further with it;[1] nor does it legalize what is done while the suspension continues; it merely suspends for the time this particular remedy.[2]

### MILITARY COMMISSIONS[3]

**682.** During the existence of war, and in the exercise of military government or of martial law in the territory under its jurisdiction, the usual functions of government being suspended, the military commander is authorized, by the established customs and usages of the laws of war, to organize tribunals for the trial of offenders, and offenses, under those laws, not subject to ordinary civil or military tribunals. In the service of the United States such tribunals are called "military commissions." Their existence and authority under such circumstances has been recognized not only by Congress, in Sec. 1343, Revised Statutes of the United States, where the military commission is designated as a proper tribunal for the trial of spies, but in the decisions of the Supreme Court of the United States.[4]

"When martial law prevails, the civil power is superseded by the military power; the military power becomes supreme; the safeguards of the Bill of Rights of the Constitution are for the time being set aside; and the civilian may be tried by military commission."[5]

**683. Constitution.**—There being no statutory provision governing the organization of military commissions, they have generally been constituted by the same military authorities who are empowered by the Articles of War to constitute general courts-martial.[6]

[1] Ex parte Milligan 4 Wall. (71 U. S.) 131.
[2] Cooley, Prin. Const. Law, p. 289.
[3] See ante, Sec. 32.
[4] Ex parte Vallandigham, 1 Wall. (68 U. S.) 243; Ex parte Milligan 4 Wall. (71 U. S.) 3.
[5] Lieber Use of the Army in Aid of Civil Power; Dig. Op. J. A. G. p. 786.
[6] See Arts. 72 and 73; Winthrop's Military Law, Vol 2 p. 63.

**684. Composition.**—The composition of such a tribunal and the number and character of the persons composing it lie within the discretion of the officer constituting it. Legally it may be composed of such persons, of such number and rank, as the commander may designate; even civilians may be designated as members.[1] In general, the number of members constituting such tribunals has been either three or five; precedent would indicate that there should not be less than three, and, when it is possible, an officer to act as judge-advocate or recorder. If no such officer be detailed, the junior member will act as recorder.

**685. Jurisdiction.**—"Military commissions are authorized by the laws of war to exercise jurisdiction over two classes of offenses committed, whether by civilians or military persons, either (*a*) in the enemy's country during its occupancy by our armies and while it remains under military government, or (*b*) in a locality, not within the enemy's country or necessarily within the theater of war, in which *martial law* has been established by competent authority." [2]

"The two classes of offenses are: (1) Violation of the laws of war. (2) Civil crimes, which, because the civil authority is superseded by the military, and the civil courts are closed or their functions suspended, cannot be taken cognizance of by the ordinary tribunals. In other words, the military commission, besides exercising under the laws of war, a jurisdiction of offenses peculiar to war, may act also as a substitute, for the time, for the regular criminal judicature of the State or district." [3] But it has no jurisdiction of civil suits or proceedings, either based upon contract brought to recover damages on account of private transactions, or personal injuries.[4]

[1] Winthrop's Military Law, Vol. 2, p. 64.
[2] Dig. Op. J. A. G. 1680.
[3] Id.
[4] Id. 1692.

Nor does it have jurisdiction in a loyal State which has not been invaded and which is not engaged in rebellion, and where the Federal authority is unopposed and the Federal courts unobstructed, to try a civilian resident there on any criminal charge whatever, even though the privilege of the writ of *habeas corpus* has been suspended.[1]

**686. Procedure.**—Military commissions follow the mode of procedure adopted for general courts-martial, but it is not obligatory. The accusations before them are generally drawn in the form of charges and specifications; the accused is allowed counsel; his witnesses are subpœnaed for him; he is permitted to exercise the right of challenge; the members of the court, judge-advocate, and witnesses are sworn; the pleas and defense as made, the general manner and form of proceeding, and the record itself, are all similar to those adopted by general courts-martial.

**687. Judgments.**—The finding and sentence of the military commission do not become effective until approved by the reviewing authority, as in general courts-martial; but the action and power of such authority is not limited as it is in trials by such courts. The sentences it may adjudge are within the discretion of the commission, subject to the requirements of the laws of its own country and the conditions imposed by the laws of war.[2] Its judgments, when approved, rest upon the same basis as those of other legal tribunals and are not subject to review by civil courts, except upon the question of jurisdiction,[3] nor to appeal thereto.[4]

[1] Ex parte Milligan, 4 Wall. (71 U. S.) 2.

[2] Birkhimer's Military Government and Martial Law, Sec. 614, 616; See Sec. 1343, R. S., and Instructions for the Government of the Armies of the U. S. in Time of War; G. O. 100, A. G. O., 1863; Field Service Regulations, U. S., 1905.

[3] Ex parte Milligan, 4 Wall. (71 U. S.) 2.

[4] Ex parte Vallandigham, 1 Wall. (68 U. S.) 251, 253.

## EMPLOYMENT OF TROOPS IN THE ENFORCEMENT OF THE LAWS

**688.** The Constitution provides: "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." [1]

It is the constitutional duty of the President to take care that the laws be faithfully executed. [2] Under this authority the President may, if the emergency arises, use the entire strength of the nation, including the Army and the militia, for the purpose.[3]

**689. The Army as Posse Comitatus.**—The use of the Army in the enforcement of the laws has been strictly limited by Act of Congress, which states that: "From and after the passage of this Act it shall not be lawful to employ any part of the Army of the United States, as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by Act of Congress, . . . and any person wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment." [4]

**690. Purposes for which Army may be Used.**—While the laws under which the Army may be employed are

[1] Art. IV, Sec. 4.
[2] Art. II, Sec 3.
[3] In re Debs, 158 U. S. 582; In re Neagle, 135 U. S. 1.
[4] Act of June 18, 1878.

given in full in Army Regulations,[1] it may be briefly stated here that it may be used for the following purposes, viz.: For the enforcement of civil rights and the execution thereunder of warrants or other judicial processes;[2] the suppression of peonage in New Mexico;[3] the control of Indians and their territory, by examination and seizure of stores therein contrary to law, and the removal therefrom of unauthorized persons, the apprehension of persons violating the laws therein, conveying them immediately, by the nearest convenient and safe route, to the civil authority of the Territory or judicial district in which they are found; the apprehension of Indians who have committed any crimes, offenses, or misdemeanors, and the prevention of hostilities between Indian tribes;[4] the protection of public lands;[5] to aid in the execution of established quarantine and health laws of any State, when directed by the Secretary of the Treasury;[6] in cases of extradition;[7] the preservation of neutrality;[8] and in case of insurrection in any State against the government thereof;[9] or for the enforcement of the ordinary course of judicial proceedings and the faithful execution of the laws, or in case of rebellion against the authority of the United States, whenever the laws thereof may be forcibly opposed or their execution be forcibly obstructed;[10] and to suppress insurrection, domestic violence, unlawful combinations, or conspiracies which obstruct or hinder the execution of the laws of any State or of the United States, or deprive any portion or class of people of any State of the rights, privileges, immunities, or protection to which they are entitled under the Constitution and

[1] A. R., 487–492.
[2] Sec. 1984, 1989, R. S.
[3] Sec. 1990, 1991, R. S.
[4] Sec. 2118, 2147, 2150, 2151, 2152, R. S.
[5] Sec. 2460, R. S.
[6] Sec. 4792, R. S.
[7] Sec. 5275, R. S.
[8] Sec. 9–18, Act Mar. 4, 1909, 35 St. L. 1089–91.
[9] Sec. 5297, R. S.
[10] Sec. 5298, R. S.

secured to them by the laws for the protection of such rights.[1]

**691.** Officers of the Army will not permit troops under their command to be used as a *posse comitatus*, or in execution of the laws, except in accordance with the foregoing provisions.[2, 3]

**692.** In the enforcement of the laws the troops of the United States act under the orders of the President as Commander-in-Chief; the commanding officers of the troops are directly responsible to their military superiors, and cannot be directed to act under the orders of any civil officer, nor can they justify any unlawful or unauthorized act on the ground of an order or request received from a United States marshal or any other civil officer.[4]

Where an officer is applied to for the use of troops for any purpose allowed by law, the application, with statement of all material facts, must be forwarded to the President, unless there is an emergency so imminent as to render delay dangerous and one which will justify his immediate action, which, in such case, will be reported at once, with the circumstances requiring it, by telegraph, to

[1] Sec. 5299, R. S.

[2] A. R., 489.

[3] Under Sections 5298 and 5299, R. S., the following are some of the laws which are to be enforced: That which prohibits the obstructing or retarding the passage of mail, and all other laws relating to the carrying of the mail (See Chapter 8, Act of March 4, 1909, 35 St. L. 1123-34), the provisions for the protection of trade and commerce against unlawful restraints and monopolies (Act July 2, 1890); for the use of the Northern Pacific Railroad, or any part thereof, as a post route and military road (Act July 2, 1864), and of the Union and Central Pacific Railways and telegraph lines for transportation and dispatches (Act July 1, 1862); for the use of the Atlantic and Pacific Railroad as a post route and military road (Act July 27, 1866); to prevent vessels or cargoes in the hands of customs officers being taken from them by force (Sec. 5316, R. S.); to protect the rights of the discoverer of a guano island (Sec. 5577, R. S.); and to suppress lawless violence, invasion, insurrection, or rebellion in Hawaii (Act April 30, 1900). Troops may also be used to remove trespassers from military reservations (Dig. Op. J. A. G. 1704, 1713). In Alaska the prohibition of the Act of June 18, 1878, as to use of the Army as *posse comitatus*, has been specifically withdrawn by Congress (Act June 6, 1900).

[4] A. R. 491.

The Adjutant General of the Army.[1] In all civil disorders, therefore, troops, as an organization, must remain absolutely neutral and passive until they have the requisite military authority for their action.

**693.** The emergency for the use of troops having arisen, the method then used to meet the emergency, and the responsibility therefor, lies with the military commander; he is not subject to dictation from civil authority.

"When the United States is called upon to protect a State against 'domestic violence' its military forces act in aid of the State authorities to the extent necessary to re-establish the civil authority; they are not, however, under the command of the State authorities, but of their military officers under the President, . . . to perform a duty to the State imposed upon the United States by the Constitution." [2]

**694.** It being the duty of the President, under the Constitution, to take care that the laws be faithfully executed,[3] he may, when the necessity arises therefor, use the entire strength of the Nation, including the Army and the militia, for the purpose;[4] and for such action the government of the United States has jurisdiction over every foot of soil within its territory, and acts directly upon the citizen. It is, therefore, not necessary to ask the permission of the State authorities to enter the limits of a State in order to enforce the laws of the United States.[5] Whenever it becomes necessary in the judgment of the President to use the military forces, in cases of insurrection, unlawful obstructions, or assemblages of persons, or rebellion against the authority of the United States, it is required that the President shall forthwith, by proclamation, command the

[1] A. R. 490.
[2] Dig. Op. J. A. G 1646.
[3] Const., Art. II, Sec. 3.
[4] In re Debs, 158 U. S. 582; In re Neagle, 135 U. S. 1.
[5] In re Debs, 158 U. S. 564; Ex parte Siebold, 100 U. S. 394, 395.

insurgents to disperse and retire peaceably to their respective abodes.[1] The limit of time within which they must comply lies within the discretion of the President, but it must be stated in the proclamation.

### RELATIONS OF MILITARY PERSONS TO CIVIL AUTHORITY

**695.** In time of peace the military is subordinate to the civil authority. Persons on entering the military service do not, thereby, relieve themselves of their civil obligations, but assume a new status in which they become additionally responsible to the military laws, and therefore subject to both civil and military authority.

An officer, like any citizen, is liable to civil suit for damages claimed on account of wrong done to, or responsibilities incurred toward, individuals as a result of breaches of contract, debts, and other similar matters involved in the usual business relations between men, according to the laws of the State in which such action properly lies.

In a *Territory*, where the government is under laws enacted by Congress, officers and soldiers, unless specially exempted by law, are amenable to the local courts in the same manner and to the same extent as civilians.[2]

**696.** For offenses committed within the limits of a reservation over which exclusive jurisdiction has been ceded to the United States they are responsible to the military authority and United States courts only. But for crimes committed within the jurisdiction of any State or Territory, being an offense against the laws thereof, the soldier, as well as the civilian, is liable to prosecution before the courts of such jurisdiction.

**697** An exception to arrest is made by law, whereby no enlisted man shall, during his term of service, be arrested

[1] Sec. 5300, R. S.
[2] Winthrop, Abr. Mil. Law, 3d Ed., p. 348.

on mesne process, or taken or charged in execution for any debt, unless it was contracted before his enlistment, and amounted to twenty dollars when first contracted.[1]

**698.** The method of securing the persons of officers or soldiers accused of offenses against the civil law is prescribed by the 59th Article of War and has been previously discussed.[2]

**699.** Officers and soldiers are liable to civil actions, as other citizens, before the proper civil courts, for breaches of contract and in suits for damages or for other civil remedies. An officer may be sued, as any citizen, for damages for illegal or excessive punishment of an inferior, or by any citizen for damages arising from excess of his authority, and he is liable for the execution of an illegal order. But he is not liable on contracts made by him for the government, when he has acted within the scope of his authority. His contracts made on account of the government are public and not personal. They enure to the benefit of and are obligatory on the government; not on the officer.[3]

The United States, like all sovereigns, cannot be impleaded in a judicial tribunal except so far as they have consented to be sued. The exemption of the United States, however, from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable in an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States. Such officers and agents are liable, in such case, to be sued, although acting under the order of the United States, when the orders or instructions given them are not strictly warranted by law.[4]

[1] Sec. 1237, R. S.

[2] See ante, par. 107–116.

[3] Hodgson v. Dexter, 1 Cr. (5 U. S.) 362; Parks v. Ross, 11 How. (52 U. S.) 362; Belknap v. Schild, 161 U. S. 17.

[4] Belknap v. Schild, 161 U. S. 17, 18; Little v. Barreme, 2 Cr. (6 U. S.) 170; Bates v. Clark, 95 U. S. 204.

An officer is not subject to garnishee for money in his hands due to persons in the service of, or employed by, the United States. Such money is the property of the United States until it has actually passed into the possession of the party to whom it is due.

**700.** Whenever an officer or soldier is prosecuted for an act done under proper official authority he is, as a rule, defended by the United States, upon application made to the Secretary of War, and by him to the Attorney-General, for counsel for his defense; and, though a judgment may be obtained against him, if he acted in good faith and with sound discretion, Congress will usually indemnify him, by appropriating a sum to cover the judgment and necessary expenses.

**701.** If an officer should be arrested by State authorities, and held to trial on a criminal charge, for an act done under color of authority of law of the United States, he should at once apply to a United States court or judge for a writ of *habeas corpus*. That court or judge will usually issue such writ. But where the offense is committed, in time of peace, within the jurisdiction of a State, all the parties being outside a military reservation, the court may decline to issue such writ, and leave the determination of the case to the State courts.[1] The only remedy for the accused is then by appeal through the highest State courts to the Supreme Court of the United States.

But where there is no conflict of testimony as to whether or not the act was wanton, and a soldier in the service of the United States, while acting in good faith and without malice or criminal intent, in the supposed discharge of his duty, accidentally kills a person, the State authorities are without jurisdiction to try him for the homicide.[2]

[1] U. S. ex rel. Drury v. Lewis, 200 U. S. 1.
[2] U. S. v. Lipsett, 156 Fed. Rep. 65.

**702. Taxation.**—None of the instrumentalities of government can be taxed, and the necessary instruments of office used by an officer of the United States in performance of his duties are exempt from taxation. Persons, whether soldiers or civilians, are subject to be taxed on real estate owned by them wherever it is located, and personal property may also be taxed except when it is held within the limits of a reservation over which the United States has exclusive jurisdiction. Persons who reside on a military reservation, under jurisdiction of the United States, are exempt from State, county, or town taxes.[1]

**703.** "An officer or soldier of the Army, though not taxable officially, may be taxable personally. He is not taxable by a State for his pay, or for arms, instruments, uniform clothing, or other property pertaining to his military office or capacity, but as to household furniture and other personal property, not military, he is (except when stationed at a place under the exclusive jurisdiction of the United States) equally subject with other residents or inhabitants to taxation under the local law."[2]

The salary of a retired officer is not subject to taxation by State or municipal authorities, for he is a part of the Army, though a part not often called into its active operations.[3]

It has been held that the Post Exchange is one of the instrumentalities of government of the United States and therefore not liable for local or municipal taxes or licenses.[4]

**704.** Where persons, either military or civil, who reside on government reservations, are exempt from taxation

[1] 6 Op. Attorney-General 577; Dig. Op. J. A. G. 2427; Dobbins v. Commissioners Erie Co., 16 Pet. (41 U. S.) 435.
[2] Dig. Op. J. A. G. 2428.
[3] Id. 2426.
[4] Id. 2014, 2436.

for property held thereon, they are also entirely separated from the enjoyment of the rights and privileges of the adjoining State or municipality. They cannot vote, nor have they a right to send their children to the public schools, or to use the public libraries, or to have the protection of the fire department or like privileges of a resident, unless such privileges are extended by the laws of the State or of a municipality. In turn they are exempt from militia duty, service as jurors, labor on roads, and from civil and criminal process of the local courts, except so far as the right to execute the same has been reserved to the State.[1]

[1] Winthrop's Abr., 2d Ed., pp. 347, 348.

## CHAPTER XXXI

### THE ARTICLES OF WAR SEPARATELY CONSIDERED

**705.** It is often necessary for courts-martial to act upon and determine questions concerning the construction of the law relating to offenses brought before them. In such construction they are guided by precedent, by decisions and rulings of the courts, and by the Opinions of the Attorney-General and of the Judge-Advocate-General of the Army; therefore some of the more important of these decisions and Opinions, referring to certain Articles of War, are given in this text.

**706.** In the enactment of the Articles of War for the government of the Armies of the United States it is specifically stated that the word "officer," as used therein, shall be understood to designate commissioned officers; the word "soldier" shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men, and that "the convictions mentioned therein shall be understood to be convictions by court-martial." [1]

The professors, cadets, the army detachments and band at the United States Military Academy, are a part of the military establishment, being included in "the Army of the United States" as organized by law; [2] are subject to the Rules and Articles of War, and to trial by general court-martial.[3]

[1] Sec. 1342, R. S.
[2] Sec. 1094, R. S.; Act Feb. 2, 1901.
[3] Sec. 1320–1326, R. S.

**707. Section 1342, R. S. The armies of the United States shall be governed by the following rules and articles. The word officer, as used therein, shall be understood to designate commissioned officers; the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial.**

**708. Article 1. Every officer now in the Army of the United States shall, within six months from the passing of this act, and every officer hereafter appointed shall, before he enters upon the duties of his office, subscribe these rules and articles.**

This Article is practically obsolete and may be regarded as superseded by the "oath of office" now required to be taken, in which the officer swears that he "will well and faithfully discharge the duties of his office," [1] which oath may be administered by "any officer who is authorized, either by the laws of the United States, or by the local municipal law, to administer oaths.[2]

**709. Art. 2. These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation, in the following form: "I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war." This oath may be taken before any commissioned officer of the Army.**

It will be observed that *any* commissioned officer is authorized by this Article to administer the oath of enlistment.

ENLISTMENT

**710. Art. 3 Every officer who knowingly enlists or musters into the military service any minor over the age of 16 years without the written consent of his parents or guardians, or any minor**

[1] Sec. 1756, R. S. [2] Sec. 1758, R. S.

**under the age of 16 years, or any insane or intoxicated persons, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offense, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct.**

The object of this Article was to prohibit the enlistment of persons of the classes specified therein, and to effect this object its prohibitions are directory to, and directly affect, the recruiting officer. Should an enlistment be accomplished contrary to the provisions of the Article, that fact, though rendering the officer liable to punishment, would not of itself affect the validity of the contract, were it otherwise legal.

**Enlistment** is a contract, but, unlike an ordinary contract, it is one which "*changes the status*" of the person who enlists, and a breach of such a contract does not destroy the status or relieve from the obligation which its existence imposes.[1]

The new status may be acquired either by taking the oath of enlistment or by the receipt of pay from the Government as a soldier.[2]

**Insane and Intoxicated Persons.**—Insane and intoxicated persons are incompetent to enter into any contract when in such condition; and should they attempt to do so such action would be absolutely void; there would be no contract.

Enlistments of the other classes mentioned, who have contractual capacity, are not void but voidable only at the option of the government, or, in the case of minors, by their parents or guardians in the manner provided by law.

This Article likewise forbids the enlistment of any person who has been convicted of any infamous crime, which

[1] In re Grimley, 137 U. S. 151; In re Morrisey, id. 159.
[2] In re Grimley, 137 U. S. 156; Art. 47.

is one especially declared to be so by statute, or one the punishment of which involves confinement in a State prison or penitentiary.

**Minors.**—The limits of age for original enlistment in the Army are now 18 and 35 years.[1] Minors between the ages of 18 and 21 may be enlisted with the written consent of their parents or guardians, provided they have such, who are entitled to their custody and control. If a minor takes the oath of enlistment, asserting therein that he is over 21 years of age, it is a fraudulent enlistment; but the minor cannot claim release on account of his minority; he cannot take advantage of his fraud and, by his own act, relieve himself from his obligations as a soldier or his liability to military control.[2]

The United States may, however, release the minor from his contract, or such release may be secured through an application of the parent or guardian, entitled to his service, and discharge thereupon ordered by a United States court. The provision of law with reference to the enlistment of a minor is for the benefit of the parent or guardian, entitled to his custody and control, and gives no privilege to the minor.[3] He is subject to charges and trial for fraudulent enlistment or other military offense,[4] and will not, if under charges, be discharged on a writ of *habeas corpus* secured by his parent or guardian, until the termination of the military proceedings and the expiration of his sentence, if any be imposed thereunder.[5]

The act prohibiting the enlistment of minors applies to such enlistments in the volunteer army.[6]

[1] Act March 2, 1899; A. R. 858.
[2] In re Grimley, 137 U. S. 147; In re Morrisey, id. 157.
[3] Id.
[4] In re Kaufman, 41 Fed. Rep. 876; In re Miller, 114 Fed. Rep. 838.
[5] In re Lessard, 134 Fed. Rep. 305; In re Grimley, 137 U. S. 150; In re Scott, 144 Fed. Rep. 79; see ante, par. 229; In re Lewkowitz, U. S. Ct. Ct. So. Dist. N. Y., Aug. 14, 1908; Dillingham v. Booker, 163 Fed. Rep. 696.
[6] In re Burns, 87 Fed. Rep. 796.

**Deserter.**—The Article also prohibits the enlistment of any deserter from the military or naval service of the United States. A "deserter" is a duly enlisted soldier who has broken his contract of enlistment by absenting himself from his proper command with an intent not to return. The term includes not only those who have been convicted of desertion, but also those who are absent in desertion, charged therewith on the rolls and returns of the command to which they belong.[1]

The provisions of the Article do not, however, apply to a deserter who has been restored to duty without trial and, after good and faithful service, receives an honorable discharge.[2]

**Fraudulent Enlistment.**—Fraudulent enlistment and the receipt of any pay or allowance thereunder is declared to be a military offense, and punishable by court-martial, under the 62d Article of War.[3]

"A fraudulent enlistment is an enlistment procured by means of a wilful misrepresentation in regard to a qualification or disqualification for enlistment, or by an intentional concealment of a disqualification, which has had the effect of causing the enlistment of a man not qualified to be a soldier, and who but for such false representation or concealment would have been rejected."[4]

In charges for fraudulent enlistment the allegation in the specification of receipt of pay and allowances is essential to properly describe the military offense defined and prohibited by the statute.[5]

A soldier who enlists fraudulently may be either proceeded against by charges under the 62d Article of War or he may be discharged "without honor."[6] But if charges are brought against him and, upon conviction, the

[1] Davis' Mil. Law, p. 350.
[2] See Cir. 73, War Dept. 1907.
[3] Act July 27, 1892
[4] Cir. 13, H. Q. A., A. G. O. 1892.
[5] Dig. Op. J. A. G. 1418; see In re Carver, 103 Fed. Rep. 624.
[6] A. R. 148.

sentence does not include dishonorable discharge, the government cannot also then summarily discharge him.[1]

DISCHARGES

**711. Art. 4. No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer, when no field officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.**

A discharge in writing in pursuance of the foregoing Article separates the soldier from service in the Army. It is the legal evidence of the fact of his discharge therefrom; of his release from the enlistment contract, and of the circumstances, when stated, under which it was given.[2] It releases him from amenability for all offenses charged against him during that particular enlistment, including that of desertion, except as provided in the 60th Article of War; but it does not relieve him from the consequences of a desertion committed during a prior enlistment.[3]

Discharge before expiration of service may be given:

(*a*) By order of the President or Secretary of War.
(*b*) By sentence of a general court-martial or military commission.
(*c*) On certificate of disability.
(*d*) In compliance with an order of one of the United States courts, or a justice or a judge thereof, on a writ of *habeas corpus*.
(*e*) By purchase and by favor under rules published by the War Department.[4]

[1] Dig. Op. J. A. G. 1413.
[2] Id. 1152.
[3] Id. 1166.
[4] A. R. 138, 142.

The contract of enlistment, though made for a fixed term, may be annulled by discharge of the soldier by Executive order under the authority conferred by this Article, and such discharge is in legal effect an honorable discharge.[1]

When granted upon petition of the soldier, conditions may be prescribed.[2]

When a soldier has enlisted for a certain term of years only, he has a legal right to discharge at the expiration of that term; but he cannot discharge himself. If he is illegally held beyond his term of enlistment his recourse should be to the Federal courts for a writ of *habeas corpus*, which, upon the fact of illegal detention being shown, will operate to release him without any regard to a military discharge.[3]

### MUSTER; FALSE MUSTER

**712. Art. 5. Any officer who knowingly musters as a soldier a person who is not a soldier shall be deemed guilty of knowingly making a false muster, and punished accordingly.**

A "muster" is the assembling, inspection, and verification of the members of any command, or any component part thereof, and official acceptance thereof, as in the service of the United States, and is usually made on entrance of an organization into the service of the United States as a body, or of an organization already in the service prior to regular payments thereto.

The muster is made from rolls previously prepared by the commanding officer, showing the individuals, arms, animals, etc., pertaining to the command which are to be verified by the mustering officer.

A "false muster" is the illegal acceptance of any person or thing borne on the rolls, which is not there in con-

[1] Davis' Mil. Law, p. 356.
[2] Grimley v. U. S., 32 Ct. Cl. 285.
[3] See Dig. Op. J. A. G., p. 5, note.

formity with law and regulations, or of which the character or condition is not such as is certified to by the mustering officer. The substitution of one man or horse for another, whether belonging to the service or not, the presenting of either a second time, under a different description, at the same muster; the mustering of any person as a soldier who is in fact not a soldier; or the reporting of officers and men as present who are really absent, or as belonging to the organization after they have been separated therefrom by death, discharge, or otherwise, or representing the members of the body as efficient when by their condition and according to regulation they are inefficient, would be some of the acts which constitute false muster.[1]

The word "knowingly" or "knowing," where it occurs in these Articles, is an essential element of the crime, and should be specifically alleged in any specification drawn under said Articles, as showing the intent.

RECEIVING PAY, ETC., FOR MUSTER

**713. Art. 6. Any officer who takes money, or other thing, by way of gratification, on mustering any regiment, troop, battery, or company, or on signing muster rolls, shall be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.**

The receipt of money, or of any other thing, by way of gratification for mustering an organization, or a false muster of man or horse, or the making of a false certificate relating to the absence or pay of an officer or soldier, subjects the offender to the mandatory penalty of dismissal under the foregoing Articles, and, under the 6th and 14th Articles, to the additional penalty of disability to hold office or employment under the United States.

RETURNS

**714. Art. 7. Every officer commanding a regiment, an independent troop, battery, or company, or a garrison, shall, in**

[1] Davis' Mil. Law, p. 369; Samuel, p. 301.

**the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. And any officer who, through neglect or design, omits to send such returns, shall, on conviction thereof, be punished as a court-martial may direct.**

A "return" is an official account or statement, or report rendered by an officer to his superior, pertaining either to the strength, organization, and condition of his command, with, under the 7th Article of War, the names of absent officers and the time of their absence; or it may be an account of the arms, ammunition, clothing, public funds, property, or stores, which is required to be made by an officer in possession thereof or accountable therefor.

The former are called "returns of strength of command," the latter "money accounts" or "property returns." Returns of strength of the command are usually made to commanding officers, superior in rank to the officer making the return, or to the War Department.

**715. Art. 8. Every officer who knowingly makes a false return to the Department of War, or to any of his superior officers, authorized to call for such returns, of the state of the regiment, troop or company, or garrison under his command; or of the arms, ammunition, clothing or other stores thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered.**

"Property returns" and "money accounts" are made to those departments to which accountability for property or money belongs, each supply department, with the Pay Department, having its form for returns and regulations, with regard thereto.

All officers charged with accountability for property or money are required to make returns therefor supported by proper vouchers, in accordance with the regulations of the department concerned.

It is only as a commander of a regiment, troop, company, or garrison, that an officer can be made amenable under this Article. An officer not exercising one of those commands is not within its terms. The word "returns" as used in this Article does not include returns of "funds," but it refers mainly to the *personnel* of the command. A false return for a company fund would more properly be charged under another Article, as the 61st or 62d.[1] These returns include, however, those required to be made to the War Department under Article 8, and such other returns or reports, as to the strength or composition of a military command, as may be required from time to time by proper superior authority; together with such as may be required to be rendered in respect to the several classes of public property specified in this Article. "The amenability herein referred to is in addition to that enforced by the Treasury Department and its accounting officers, in accordance with the terms of the Revised Statutes, and the several enactments amendatory thereto."[2]

The sentence "to be cashiered" was formerly looked upon as more severe in character than simple "dismissal," in that the term appeared to convey an idea of disgrace with it in addition to separation from the Army; but there is now no practical difference in the use of the terms, the words "cashiered" and "dismissed from the service" being now considered practically synonymous.[3]

**716. Art. 9. All public stores taken from the enemy shall be secured for the service of the United States; and for neglect thereof the commanding officer shall be answerable.**

This Article is in accordance with the rules of International Law and the Laws of War. The title to captured property vests in the captor's government and not in the

[1] Dig. Op. J. A. G., p. 6.
[2] Davis' Mil. Law, p. 360.
[3] Court-martial Manual, p. 102, note.

individual captor, who is in the service of the government.[1] All persons in the military or naval service of the United States are prohibited from buying or selling, trading, or in any way dealing in captured or abandoned property, for their own benefit, directly or indirectly.[2]

Such captures, becoming the property of the United States, are subject to the disposition of Congress, which is exclusively vested with the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," [3] and "to make rules concerning captures on land and water." [4]

"An officer or soldier of the Army who assumes of his own authority to appropriate such articles renders himself chargeable with a military offense." [5]

ACCOUNTABILITY FOR PROPERTY

**717. Art. 10. Every officer commanding a troop, battery, or company, is charged with the arms, accoutrements, ammunition, clothing, or other military stores belonging to his command, and is accountable to his colonel in case of their being lost, spoiled, or damaged otherwise than by unavoidable accident, or on actual service.**

This fixes the responsibility for the presence and condition of the arms, etc., of his command upon the officer commanding, who must be accountable to the colonel therefor, "in case of their being lost, spoiled, or damaged otherwise than by unavoidable accident, or on actual service." By "unavoidable" is intended what could not have been prevented by common and ordinary prudence, and not "what might have been avoided by *possible* or *extraordinary* exertions." [6]

[1] Davis' International Law, pp. 310, 311; G. O. 100, War Dept., A. G. O., 1863, Sec. 45; Field Service Regulations, U. S. Army, 1905.
[2] Sec. 5313, R. S.
[3] Constitution, U. S., Art. IV, Sec. 3, Clause 2.
[4] Constitution, U. S., Art. I, Sec. 8, Clause 11.
[5] Dig. Op. J. A. G., p. 7; Sec. 5313, R. S.
[6] Samuel, Mil. Law, p. 538.

**718. Art. 11. Every officer commanding a regiment or an independent troop, battery, or company, not in the field, may, when actually quartered with such command, grant furloughs to the enlisted men, in such numbers and for such time as he shall deem consistent with the good of the service. Every officer commanding a regiment, or an independent troop, battery, or company, in the field, may grant furloughs not exceeding thirty days at one time, to five per centum of the enlisted men, for good conduct in the line of duty, but subject to the approval of the commander of the forces of which said enlisted men form a part. Every company officer of a regiment, commanding any troop, battery, or company not in the field, or commanding in any garrison, fort, post, or barrack, may, in the absence of his field officer, grant furloughs to the enlisted men, for a time not exceeding twenty days in six months, and not to more than two persons to be absent at the same time.**

This Article prevents the absence of enlisted men for any undue period of time, or in large numbers, and tends to preserve the command at all times in a condition of efficiency as to its enlisted personnel.

**719. Art. 12. At every muster of a regiment, troop, battery, or company, the commanding officer thereof shall give to the mustering officer certificates, signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent non-commissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster rolls, shall be transmitted by the mustering officer to the Department of War, as speedily as the distance of the place and muster will admit.**

The provisions of this Article are merely directory and not penal. It is introductory to the Article following, which makes the signing of a false certificate a specific military offense.[1]

**720. Art. 13. Every officer who signs a false certificate, relating to the absence or pay of an officer or soldier, shall be dismissed from the service.**

[1] Winthrop, Vol. 1, p. 799.

This Article is distinguished from those relating to "false muster," in that it does not require, to constitute the offense, that the officer shall *knowingly* sign the false certificate, but only that the certificate shall be false *in fact*.[1] A trivial error made in a report should not, in the absence of fraud or bad faith, be made a ground for a charge under this Article,[2] and the mere signing by an officer of a voucher for his pay, before the last day of the month for which it was due, does not constitute an offense of the class intended to be made punishable by it.[3]

**721. Art. 14. Any officer who knowingly makes a false muster of man or horse, or who signs, or directs, or allows the signing of any muster roll, knowing the same to contain a false muster, shall, upon proof thereof by two witnesses, before a court-martial, be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.**

Under this Article proof must be made by the evidence of at least two witnesses. The disqualification to hold office prescribed therein follows as a legal consequence of conviction and the punishment of dismissal, and need not be specifically adjudged in the sentence.[4]

**722. Art. 15. Any officer who, wilfully or through neglect, suffers to be lost, spoiled, or damaged, any military stores belonging to the United States, shall make good the loss or damage and be dismissed from the service.**

The gist of the offense under this Article is the loss, spoiling of, or damage to, military stores of the United States "wilfully" or "through neglect." The "neglect" herein indicated is not ordinary neglect such as would be charged under the 62d Article of War, but a gross neglect assimilated to a wilful act, as the non-observance of special instructions or general regulations in reference to the custody or disposal of the things in charge, or in contempt

[1] Winthrop, Vol. 1, pp. 799, 800; Samuel, p. 298.
[2] See Manual Mil. Law, War Office, England, 1894, p. 366.
[3] Dig. Op. J. A. G. 4.
[4] Winthrop's Abr Mil. Law, p. 228.

of usage and customs of office, in the discharge of which the trust arises, in respect to the particular charge, etc. The neglect, to constitute a crime under this Article, must have more than a negative quality about it.[1] "The wilful or neglectful sufferance specified by the Article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted or injured by other persons; loaning it to an irresponsible person by whom it is damaged, etc." [2]

While in trial by court-martial the sentence might impose a forfeiture of the amount of pay sufficient to make good the loss or damage, yet, in the absence of any such forfeiture specified in the sentence, it would be legal and regular to "stop" the proper sum against the officer's pay. The correct form would be for the court to estimate the value of the stores lost to be a certain specified amount and then make the stoppage in accordance therewith.[3]

**723. Art. 16. Any enlisted man who sells, or wilfully or through neglect wastes the ammunition delivered out to him, shall be punished as a court-martial may direct.**

The "waste" contemplated is failure to take care of ammunition issued, losing it, allowing it to be damaged, reckless expenditure in firings, giving it away, etc.[4]

**724. Art. 17. Any soldier who sells, or through neglect loses or spoils his horse, arms, clothing, or accoutrements shall be punished as a court-martial may adjudge, subject to such limitation as may be prescribed by the President by virtue of the power vested in him.[5]**

[1] Samuel, Mil. Law, pp. 516, 517; Winthrop, Vol. 1, p. 792.
[2] Winthrop, Vol. 1, pp. 792, 793. See G. C. M. O. 85, H. Q. A., 1882.
[3] Id. 793.
[4] Id. 794.
[5] See Act July 27, 1892, G. O. 57, A. G. O., 1892.

The President has designated limits of punishment under this Article in his Executive Order of June 12, 1905, and November 25, 1908.[1]

There are three distinct and separate offenses punishable under this Article, viz., "selling," "through neglect losing," and "spoiling"; and any charge drawn must be with a specification for the distinct offense committed. When there is doubt as to which will be established by the testimony, the act may be charged under two or more forms, and the accused is not entitled to call upon the prosecution to *elect* under which charge it will proceed in such case.[2] The charge cannot be drawn in the *alternative* form, as "did sell *or* through neglect lose." [3]

"Clothing issued and charged to a soldier is not now (as formerly) regarded as remaining the property of the United States. It is considered as becoming, upon issue, the property of the soldier, although his use of it is, for purposes of discipline, qualified and restricted. Thus he commits a military offense by disposing of it as specified in this Article, though the United States may suffer no loss." [4]

But it is now held that the clothing so issued to a soldier, while in the military service, remains the property of the U. S., within the meaning of Sec. 5438 R. S. of the U. S., now embodied in Sec. 35, Act March 4, 1909, 35 St. L. 1095–6, which provides for the punishment of every person who knowingly purchases or receives it in pledge contrary to the provisions thereof.[5]

"The present 17th Article (as amended by the Act of July 27, 1892) does not authorize a stoppage or forfeiture of pay to re-imburse the United States." [6] "The court-martial under this Article simply imposes punishment; it does not pass upon the question of pecuniary responsibility." [7]

[1] See G. O. 96, War Dept. 1905; G. O. 204, War Dept. 1908, Appendix D.
[2] See Court-martial Manual, p. 19.
[3] See ante, par. 119.
[4] Dig. Op. J. A. G. 11.
[5] U.S. v. Hart, 146 Fed. Rep. 202.
[6] Dig. Op. J. A. G. 12.
[7] Id. 5.

As an enlisted man cannot assign the wages he earns and receives from the United States, as a soldier, until his discharge, so he cannot exercise any such right over his clothing, which he receives from the same source and for the same service.

The purpose of the issue, and the condition upon which clothing is issued to a soldier, is that it is to be used by him in the service of the United States, and he is prohibited, by this Article and by other provisions of law,[1] from selling, or through neglect losing or spoiling, exchanging, pledging, loaning, or giving away clothing, arms, or accoutrements so furnished him.

The United States has, therefore, a qualified right in, and title to, clothing issued for the use of a soldier which will justify the seizure thereof when found in the illegal possession of a third person, under the provisions of the statutes mentioned. All persons are presumed to know the law and to be aware of the fact that the sale by a soldier of the clothing issued to him by the United States, to be worn in its service, is forbidden, and, therefore, that its purchase is unlawful.

When the soldier is discharged, however, the contract with the United States ends, and with it ceases all interest of the United States in the uniform clothing legally in possession of the soldier at his discharge.[2] As a citizen he may sell that which belongs to him; as a soldier he is prohibited by law from selling articles issued to him for use in the service.

Section 5438, Revised Statutes,[3] provides for the punishment of every person who "knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished them under a clothing

[1] Sec. 1242, R. S. [2] Dig. Op. J. A. G. 2276.
[3] Now embodied in Sec. 35, Act March 4, 1909, 35 St. L. 1095–6.

allowance or otherwise, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall be punished by imprisonment for not more than two years and by a fine not exceeding $500."[1]

It also provides that any person who, knowingly, or with intent to defraud, makes, or causes to be made or presented, for payment or approval, to any person in the service of the U. S., any claim against the Government, or makes, uses, or causes to be made or used, any false document in support thereof, or enters into any agreement or conspiracy to defraud thereby, or, being responsible for money or property for use in the military or naval service, delivers less amount thereof than he receives receipt for, or makes or delivers receipt or other paper therefor without full knowledge of the truth of facts stated therein, shall be imprisoned for not more than five years or fined not more than five thousand dollars, or both.

In view of the qualified interest possessed by the United States in clothing issued to soldiers for their use in the service, it is held that sufficient title remains to the United States to warrant prosecution under this section and the punishment of the illegal purchaser.[2]

There is an undoubted right to seize such articles under the provision of Sections 1242 and 3748, Revised Statutes, because of the qualified interest still held by the United States, and the same interest will justify prosecution for illegal purchase, or receiving in pledge, these same articles, so unlawfully obtained, under the terms of Section 5438, Rev. Stat.,[3] now Sec. 35, Act March 4, 1909, 35 St. L. 1095–6.

While an officer has the legal right to summarily seize "clothing, arms, and accoutrements" furnished by the

[1] Sec. 5438, Rev. St. U. S., as amended by Act of May 30, 1908; G. O. 100, War Dept. 1908, and Sec. 35, Act March 4, 1909, 35 St. L. 1095–6.

[2] Op. J. A. G., Oct. 14, 1905, No. 16107; U. S. v. Hart, 146 Fed. Rep. 202; U. S. v. Koplik, 155 Fed. Rep. 919.

[3] Id.; case of U. S. v. Chas W. Durrah and George Dixon; and of U. S. v. Haase, U. S. Court, Eastern Dist. of Kentucky, 1905; U. S. v. Michael, 153 Fed. Rep. 609; U. S. v. Smith, 156 Fed. Rep. 859; Act May 30, 1908; G. O. 100, War Dept. 1908.

United States to any soldier, which he may find in the possession of persons not soldiers or officers of the United States, under authority of Sections 1242 and 3748, Revised Statutes, this right of seizure is limited to any "officer," civil or military, and in exercising the right he must act upon sufficient and satisfactory knowledge, and have the evidence sufficient to justify his act in case of prosecution in a civil court; he must seize the property himself, using only necessary and justifiable force for the purpose. When he enters the premises of the party he should state the object of the visit and demand the property; if refused he may use only the force necessary to take the property. The officer may proceed by obtaining a warrant for the arrest of the person, and, where premises are to be entered, by obtaining a search warrant, as he thereby acts under civil authority, in accordance with it, and protects himself from any undue prosecution.[1]

Section 3748, Revised Statutes, prescribes that "the possession of any such clothes, arms, military outfits, or accoutrements by any person not a soldier or officer of the United States, shall be presumptive evidence of such a sale, barter, exchange, pledge, loan, or gift," prohibited by this statute.

The burden of proof that such article came lawfully into his possession lies upon the possessor, and so long as the officer acts within the scope of his authority he cannot be held to answer therefor under the criminal laws of the State, and if he should be held in custody by the process of a State court for such an act he may be released therefrom through the action of the United States courts.[2]

For an act which is in excess of his authority he may be sued in the State courts by any person injured by

[1] For method of procedure in obtaining a warrant, see post, par. 839.
[2] In re Fair, 100 Fed. Rep. 149.

reason thereof; but when the act is done in good faith and without malice, the officer is not liable to criminal prosecution in such courts.[1]

MISCONDUCT OF OFFICERS OR SOLDIERS

**725. Art. 18. Any officer commanding in any garrison, fort, or barracks of the United States who, for his private advantage, lays any duty or imposition upon, or is interested in, the sale of any victuals, liquors, or other necessaries of life, brought into such garrison, fort, or barracks, for the use of the soldiers, shall be dismissed from the service.**

This Article is intended to prevent officers from receiving personal benefits from the sales of articles brought into the garrison for the use of soldiers, and prohibits any interest therein, whether through a partnership with the vendor, or by receipt of any percentage from sales, and from, in any manner, directly or indirectly, profiting therefrom.

**726. Art. 19. Any officer who uses contemptuous or disrespectful words against the President, the Vice-President, the Congress of the United States, or the chief magistrate or legislature of any of the United States in which he is quartered, shall be dismissed from the service, or otherwise punished, as a court-martial may direct. Any soldier who so offends shall be punished as a court-martial may direct.**

This Article is intended to enforce respect for the governing authorities of the United States, and of the State in which any officer or soldier is stationed. To speak contemptuous words of the President would also be a most serious crime, as he is the Commander-in-Chief of the Army, and all officers and soldiers are subject to his orders. As the Vice-President will succeed to the office of President in case of the death or disability of the latter, and as Congress makes the laws which govern the Nation and the Army, any contemptuous or disrespectful words against them, either by officers or soldiers, are hereby prohibited. The civil authority being supreme in time of peace, its

[1] In re Fair, 100 Fed. Rep. 149.

proper representatives are entitled to respect, and it would be very improper and wrong for any person in the military service of the United States, when in any State, to use contemptuous or disrespectful language toward its chief magistrate or its legislature; it being the duty of the Executive Department of the government to which the Army belongs to sustain State authority and aid it in the enforcement of the law when necessary, and properly called upon, as provided by the Constitution and laws, so to do.

In those cases which have come to trial under this Article the charge has usually been against an officer for use of "contemptuous or disrespectful words against the President," or the government as represented by him. "The deliberate employment of denunciatory or contumelious language in regard to the President, whether spoken in public, or published, or conveyed in a communication designed to be made public, has, in repeated cases, been made the subject of charges and trial under this Article; and where taking the form of a hostile arraignment, by an officer, of the President or his administration, for the measures adopted in carrying on the civil war,—a juncture where a peculiar obedience and discipline were due, on the part of the subordinate, to the President as Executive and Commander-in-Chief,—it was, in general, punished by dismissal." On the other hand, it was held that adverse criticisms of the acts of the President, occurring in "political discussions," and which, though characterized by intemperate language, were not apparently intended to be disrespectful to the President personally, or to his office, or to excite animosity against him, were not in general to be regarded as properly exposing officers or soldiers to trial under this Article. To seek for ground of offense in such discussions would ordinarily be inquisitorial and beneath the dignity of the Government.[1]

Dig. Op. J. A. G. 13.

**727. Art. 20. Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct.**

"The commanding officer of an officer or soldier, in the sense of this Article, is properly the superior who, in the exercise of his command, is authorized to secure obedience to his orders from such officer or soldier." [1] The Article does not apply to language used toward an officer who is at the time temporarily detached and not in actual command of the accused. Such an offense would be chargeable under the 62d Article of War.[2]

The disrespect toward the commanding officer may be exhibited in a variety of ways, as by neglecting the customary salute, by marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in his presence, or by a systematic or habitual disregard of, or delay to comply with, his orders or directions, or by issuing counter-orders, by committing an assault not amounting to a breach of the 21st Article, etc., or it may consist in acts or language directed at the commander in his official or military character, or personally.[3] "The particular acts or words relied upon as constituting the offense should properly be set forth in substance in the specification." [4]

It is not essential that such disrespect be *intentional.* If publicly committed the offense is the more aggravated. It is no defense that the accused stated only facts or that he said no more than was *deserved* by the superior.[5] "A want of civility is equally punishable with an act of premeditated disrespect." [6]

**728. Art. 21. Any officer or soldier who, on any pretense whatsoever, strikes his superior officer, or draws or lifts up any weapon, or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior**

[1] Winthrop, Vol. 1, p. 807.
[2] Dig. Op. J. A. G. 14.
[3] Winthrop, Vol. 1, p. 805.
[4] Dig. Op. J. A. G. 14.
[5] Winthrop, Vol. 1, p. 806.
[6] Davis' Mil. Law, p. 377.

**officer, shall suffer death, or such other punishment as a court-martial may direct.**

This Article is disciplinary in its nature, and provides for the punishment of any officer or soldier who strikes, lifts up any weapon, or offers any violence against his superior officer, or who disobeys any lawful command of such superior who is, at the time, "in the execution of his office."

The act of striking, etc., must be with intent to commit violence, and not be accidental or unintentional, intent being an essential element of the offense.

"To justify a conviction of the capital offense of offering violence against a superior officer, it should be made to appear in evidence that the accused knew or believed that the person assaulted was in fact an officer in the Army and was his superior in rank";[1] and also that the officer assaulted was at the time "in the execution of his office";[2] "that is to say, in the performance of his special functions, or of any duty or act legal and appropriate for an officer of his rank or office to perform."[3] The superior officer in the sense of this Article need not necessarily be the "commanding" officer of the accused at the time of the offense.

The phrase "being in the execution of his office" is in general synonymous with "being in the performance of military duty," and describes the status of a superior officer who is engaged in the execution of duties pertaining to his station or office in the military establishment.[4]

The word "officer" in the term "superior officer" means a "commissioned officer"; non-compliance by a soldier with an order emanating from a non-commissioned officer, or offering violence to him, is not an offense under this Article, but one to be charged, in general, under the

[1] Dig. Op. J. A. G. 17.
[2] Id. 18.
[3] Winthrop, Abr., p. 230.
[4] Davis' Mil. Law, p. 388.

62d Article,[1] as should, also, disobedience of an order of a contract surgeon, of a dental surgeon, and of a veterinarian.[2]

Threats operate to aggravate an offense of assault with which they are associated or of which they form an essential part. Mere abusive words, however, not accompanied by acts indicating intent to execute them, do not constitute an offense within the meaning of the Article; nor does an act of defense of one's self, wife, child, servant, or property, nor an act of obedience to legal process or military order;[3] nor the quelling of a disorder under the 24th Article of War.[4]

But where the language is threatening or menacing in character, and coupled with a present capacity to carry the threats into effect, it will, if accompanied by acts indicative of such intention, constitute an "offer of violence," and as such be chargeable under this Article.[5]

**Disobedience of Orders.**[6]—An order is an authoritative command, whether oral or written, issued by competent military authority to a person or persons subject to his direction and which, if legal, they are bound to execute.

"The offense of disobedience of orders contemplated in this Article (21) consists in a wilful refusal or neglect to comply with a specific order to do or not to do a thing. A mere failure to perform a routine duty is properly charged under the 62d Article of War."[7] In any trial on a charge drawn under this Article for disobedience of orders, it must appear from the evidence that the order or command was "lawful." An officer or soldier is not punishable under the Article for disobeying an "unlawful"

[1] Dig. Op. J. A. G. 21.
[2] Court-martial Manual, p. 104, note.
[3] Davis' Mil. Law, p. 388.
[4] Winthrop, Vol. 1, p. 811.
[5] Davis' Mil. Law, p. 389.
[6] See ante, par. 286, 287.
[7] Dig. Op. J. A. G. 25.

order. It is not necessary that the officer giving the command be in uniform, provided his rank and position as an officer is known.[1]

"But the order of a proper superior is presumed to be lawful, and should be obeyed, where it is not clearly and obviously in contravention of law. Unless the illegality is unquestionable, the order should first be obeyed, and redress, if entitled to any, be sought afterwards. A military inferior in refusing or failing to comply with the order of a superior on the ground that the same is, in his opinion, unlawful, does so, of course, on his own personal responsibility and at his own risk." [2]

The order may be either written or oral, and communicated or delivered by the superior in person or through a third party—as a staff officer—orally or in writing; or it may be conveyed through the medium of General or Special Orders of the command or of the War Department.[3]

Whenever orders are issued through a third person, as a military representative of the superior, it should be expressly stated in the body of the communication that they are issued by the direction of the proper superior, or the words "by order of" or "by command of" the proper superior commander (naming him and his command) should be prefixed to the signature.[4] In a similar manner a verbal order given in the name of a superior should state that it is given by his order or direction. "Assuming to give an order as the order of a superior, who has not in fact directed it to be given, is a grave military offense." [5]

"Where an order is conveyed and personally delivered by a staff officer, aide-de-camp, or other messenger, to

[1] Simmons, Sec. 175
[2] Dig. Op. J. A. G. 22, 23, 1853.
[3] Winthrop, Vol. 1, p. 815.
[4] Id., p. 816; see A. R. 784.
[5] Winthrop, Vol. 1, p. 816, note.

render the recipient liable under the present Article if he fail to obey it, it is essential that he should be apprised that the bearer in fact represents the superior whose order it purports to be. Where not previously informed upon this point, the declaration to him of the messenger that he is the staff officer, aide, etc., of the superior, or that he delivers the order by the direction of such superior, is to be presumed to state the fact, and the recipient will not only be justified in complying with the order thus conveyed, but will be liable to a charge under the present Article if he does not comply." [1]

When an order has been published in the usual manner of making such orders publicly known, as by reading or posting them, knowledge thereof is presumed, and the "burden of proof" lies upon an accused to show that he was not properly notified because of not being at the time of, or during, its publication at the post or station where published, and, therefore, not chargeable with neglect or other fault in not knowing its contents.

Disobedience of an order by a military convict should be charged under the 62d Article of War.[2]

Obedience of orders, legally given, may be pleaded as a defense.[3]

**729. Art. 22. Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment, or guard, shall suffer death, or such other punishment as a court-martial may direct.**

The offense of mutiny is not defined by law, but the meaning of the word may be ascertained from the decisions of the courts,[4] and the works of writers on military law. "Mutiny, at military law, may be defined to be an unlawful opposing or resisting of lawful military author-

[1] Winthrop, Vol. 1, p. 816.
[2] Court-martial Manual, p. 104, note.
[3] See ante, par. 286–287.
[4] See U. S. v. Kelly, 11 Wheat. (24 U. S.) 418, 419.

ity with intent to subvert the same, or to nullify or neutralize it for the time." [1]

The opposition or resistance may be "passive" as well as active, and be shown by persistent refusal or omission to obey orders, with the intent to subvert authority.[2]

This Article evidently contemplates that a mutiny shall have been consummated, that a mutiny "complete in law" must actually have existed, to authorize the trial of an offender under its terms. An unsuccessful attempt to create a mutiny, or mutinuous conduct, should be charged under the 62 l Article of War.[3]

The "beginning" of a mutiny is an overt act, and the direct employment of force against authority; the "exciting" is the calling it into activity by use of words or by acts; "causing" is to bring it about in any manner by conduct or language, and would include instances in which the offender takes no personal part in the riotous demonstration, but confines himself to stimulating others to opposition or resistance; and "joining" is the offense of taking part in a mutiny at any stage of its progress.[4]

Mutiny may be the act of several persons, but it may originate and conclude with a single person; [5] and it is the "intent" which distinguishes it from those offenses punishable under Article 21, or which are to be charged as "mutinous conduct" under Article 62.[6]

It requires both the "act" and the "intent" to constitute the crime; without the "intent" necessary to constitute a violation of this Article, acts of insubordination or disorderly conduct on the part of an officer or soldier should be charged under Article 20, 21, or 62.[7]

[1] Dig. Op. J. A. G. 31.
[2] Ives, p. 244; Winthrop, Abr., p. 234.
[3] Winthrop, Vol. 1, p. 829.
[4] Id. 827–828.
[5] Samuel, p. 254; De Hart, p. 348.
[6] Dig. Op. J. A. G. 31.
[7] Davis' Mil. Law, pp. 390–391; Winthrop, Vol. 1, p. 825.

The "joining" in a mutiny constitutes a "conspiracy," and, under the common law, all the participators are principals and each is alike guilty of the offense; any act or declaration of one, made in pursuance of the common design, is the act or declaration of every other, and, the common design being established, all things done to promote it are admissible in evidence against each individual concerned. In such cases, where the mutiny is a concerted act, the charge is frequently "joint"; all or the principal of the offenders being charged and tried together accordingly.[1]

To justify trial on joint charges there must have been concert of action in an offense; the offense must be such as requires for its commission a combination, and it must have been committed in concert, in pursuance of a common intent.[2]

By "sedition" is meant an offense by acts of treasonable or riotous nature directed rather against the public peace and the civil authority than against military superiors, though necessarily involving or resulting in insubordination to military authority.[3]

The crime of mutiny or sedition must be proved by the acts constituting the offense; but words or writings forming a part of the *res gestæ* are admissible in evidence.[4]

**730. Art. 23. Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or having knowledge of any intended mutiny or sedition, does not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.**

This Article is intended not only to repress a mutiny or sedition already existing, but to forestall it and prevent

[1] Winthrop, Vol. 1, pp. 828–829; see ante, par. 581.
[2] Court-martial Manual, p. 17.
[3] Ives, p. 244; Benét, p. 258; Simmons, Sec. 170.
[4] Simmons, Sec. 821–822.

its outbreak if any officer or soldier has knowledge that it is intended. It requires each officer or soldier to "use his utmost endeavor" for its suppression, if it exists, and these words justify the use by the "officer or soldier" of force to the extent necessary to quell the mutiny, even, in extreme necessity, to using a deadly weapon and the taking of human life. But the necessity must be shown to justify such act, and such person will not ordinarily be warranted in so doing in a case of mutiny unaccompanied by violence, or where less vehement methods will be entirely effectual.[1]

The force employed in quelling the mutiny must not exceed the strict necessity of the case, such as is necessary to subdue the offenders and restore order.[2] The "giving of information" is imperatively required, with the injunction that it must be "without delay," and, therefore, an officer or soldier is not permitted to exercise his discretion as to whether he will or will not give the required information.

To sustain the charge of violation of this Article it must be averred in the charge, and it must be proved by the evidence, that an actual mutiny existed, or an intention to commit mutiny; that the accused was present at the mutiny, or had knowledge that one was intended; that he neglected or failed to use proper efforts to suppress it, or neglected or failed to give to his commanding officer, without unreasonable delay, the information that it was intended.[3]

**731. Art. 24. All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to his own or to another corps, regiment, troop, battery, or company, and to order officers into arrest, and non-commissioned officers and soldiers into confinement,**

[1] Winthrop, Vol. 1, pp. 831–832.
[2] Davis' Mil. Law, p. 392.
[3] Winthrop, Vol. 1, p. 834.

**who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or non-commissioned officer, or draws a weapon upon him, shall be punished as a court-martial may direct.**

The term "officer" as used in this Article in connection with the words "of what condition soever" is held to be a modification of the meaning of the word "officer" as defined in Section 1342, Revised Statutes, and to include non-commissioned officers as well as "commissioned" officers.[1]

An inferior should not, however, assume authority to arrest a superior in the presence of a senior in rank, unless that senior is himself concerned or conspicuously recreant to his duty, or incapacitated therefor.[2]

The power given in this Article is an application to the military service of the common law principle that any bystander may interfere to preserve the peace and arrest an affrayer and that it is his duty so to do.[3]

The disorders herein intended, however, are not the common law disorders incident to civil life, but such particular disorders as have immediate relation to quarrels and frays among people in the military service, affecting military discipline, and which demand special interference and the authority of those present to place in arrest or confinement those engaged therein and thereby prevent the continuance of the quarrel, fray, or disorder.

The person so arrested, or confined, must retain that status until his proper superior officer is made acquainted therewith and has taken suitable action in the case.

**732. Art. 25. No officer or soldier shall use any reproachful or provoking speeches or gestures to another. Any officer who so offends shall be put in arrest. Any soldier who so offends shall be confined, and required to ask pardon of the party offended, in the presence of his commanding officer.**

[1] Davis' Mil. Law, p. 393; Winthrop, Vol. 1, p. 836; ante, par. 94.
[2] Winthrop, Vol. 1, p. 837.
[3] Davis' Mil. Law, p. 393, note.

"This Article confers no jurisdiction or power to punish on courts-martial, but merely authorizes the taking of certain measures of *prevention and restraint* by commanding officers; that is, measures preventive of serious disorders such as are indicated in the two Articles relating to duels." [1]

It imposes immediate personal restraint upon the parties at the very beginning of difference between them and provides a means of settlement of the difference through the power and authority of the commanding officer.

The limit of the period of arrest or confinement is not stated, and the commanding officer may, therefore, continue it either until the matter is settled between the parties by suitable apology or reparation in a way not offending the honor or self-respect of either party.[2]

The provisions of the Article enjoining the asking of pardon, etc., are rarely resorted to; the usual practice being to prefer charges with a view to the punishment of the offender, as in case of any other offense.[3]

**733. Art. 26. No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct.**

This and the two following Articles, which prohibit duelling in the Army, are intended to provide for the punishment of each and every person connected therewith, in any way, actively or by tacit assent.

The "engaging in a duel," the actual act of fighting itself, not being made punishable as a specific military offense by the Articles of War, would, in general, be chargeable under Article 62 [4] and, therefore, be an additional

[1] Dig. Op. J. A. G. 34.
[2] Samuel, pp. 366–372.
[3] Winthrop, Vol. 1, p. 839.
[4] Dig. Op. J. A. G. 35, note 4.

charge to any charge made under Articles 25 to 28, inclusive.

A *duel* is a concerted fight between two persons with deadly weapons, at an appointed time and place, upon a precedent quarrel. It differs from an *affray* in this, that the latter occurs in a sudden quarrel, while the former is always the result of design.[1]

Duelling is forbidden by the common and the statute laws as well as by the moral code. Cool and deliberate homicide in a duel is murder in the guilty party whatever the provocation; and not only the principals but the seconds also, in a deliberate duel, are guilty of homicide.[2]

The fighting of a duel, even if there be no fatal result, is of itself a misdemeanor at common law, and all who are present and abetting are likewise guilty.[3] The challenging of another to fight a duel, the bearing of such challenge, or the provoking another to send a challenge, are misdemeanors likewise; no actual fighting is necessary to constitute these crimes.[4]

A "challenge" is a request by one person to another to fight a duel. No particular form of words is necessary to constitute a challenge, and it may be either oral or written.[5] The invitation to fight need not be tendered in direct and express terms; it is sufficient if it be conveyed indirectly and by implication. The "intention" of the language employed is the material point.[6]

Where the invitation is ambiguously or obscurely worded, or contains technical terms, it may be explained by reference to the so-called duelling code, or by the circumstances of the controversy and the acts, conversations, correspondence, etc., of the parties as exhibited in evidence;

[1] Bouvier, Law Dict'y; Wharton, Cr. Law, Sec. 1767–1770.
[2] Wharton, Cr. Law, Sec. 482–483.
[3] Id.; Clark, Cr. Law, Sec. 149.
[4] Bishop, New Cr. Law, Vol. 1, Sec. 312; Clark, Cr. Law, Sec. 149.
[5] Bouvier, Law Dict'y; Bishop, New Cr. Law, Vol. 1, Sec. 314.
[6] Winthrop, Vol. 1, p. 843.

and, in like manner, no form of words is necessary to constitute an acceptance, it being sufficient that they constitute evidence of intent to accept the invitation to fight.

The "sending" and the "accepting" of a challenge are equally punishable. The "sending" of the challenge is an offense; whether it reaches the person to whom it is sent or not is immaterial; nor is it necessary to show that the challenge, if received, was ever accepted or declined by the person to whom sent.[1]

**734. Art. 27. Any officer or non-commissioned officer, commanding a guard, who, knowingly and willingly, suffers any person to go forth to fight a duel, shall be punished as a challenger; and all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals, and punished accordingly. It shall be the duty of any officer commanding an army, regiment, troop, battery, company, post, or detachment, who knows or has reason to believe that a challenge has been given or accepted by any officer or enlisted man under his command, immediately to arrest the offender and bring him to trial.**

This Article makes any commander of a guard who knowingly or willingly suffers any person to go forth to fight a duel, and all persons acting as seconds or promoters of duels, equally responsible with the principals and punishable accordingly. It also requires every commanding officer who knows, or has reason to believe, that a challenge has been given or accepted by any officer or soldier, to arrest the offender and bring him to trial. The object of these requirements, and the severe penalties attached to a violation of this Article, are intended to prevent all duelling, as being contrary to law as well as opposed to morality and to discipline.

In order to convict the officer or non-commissioned officer "commanding a guard," it is necessary to show his knowledge of the fact that the going forth was for the purpose of fighting a duel.

[1] Bishop, Cr. Proc., Vol. 2, Sec. 307.

The "carrier" of a challenge must also have had knowledge of the character of the message; so an ordinary mail-carrier would not be responsible.

**735. Art. 28. Any officer or soldier who upbraids another officer or soldier for refusing a challenge shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept challenges, as they will only have acted in obedience to the law, and have done their duty as good soldiers, who subject themselves to discipline.**

The 28th Article is intended to enforce upon each person concerned the duty of obedience to the law, and an understanding of the fact that every person will be sustained in doing so and not be upbraided; that whoever upbraids another for refusing a challenge is himself a violator of law to be punished as a challenger.

The whole theory of the duel is opposed to all our law, municipal and moral, and is a relic of barbarism from a time when differences were settled by brute strength. Its object is to take into one's own hands the punishment of actual or supposed individual injuries, rather than to submit them to the judgment of one's peers, or to legal superior authority. It is, therefore, contrary to the Anglo-Saxon theory of justice and right as developed since feudal times, and has substantially disappeared among English-speaking and law-abiding people.

### REPARATION OF WRONGS

**736. Art. 29. Any officer who thinks himself wronged by the commanding officer of his regiment, and, upon due application to such commander, is refused redress, may complain to the general commanding in the State or Territory where such regiment is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.**

The application for redress being refused, the complaint provided for should be forwarded through the commanding officer of the regiment; forwarding it direct would not be justified unless such commanding officer refuses to forward it or holds it back unnecessarily with unreasonable delay. If, under such circumstances, the complaint is forwarded direct, the commanding officer should be notified by the officer so forwarding it, at the time he does so.

"This Article is expressly limited to cases of alleged wrongs on the part of regimental commanders. It cannot be extended to apply to a complaint of wrong done by a post commander who is not also the commanding officer of the regiment of the complainant." [1]

The wrong complained of should not be one which constitutes a military offense, that is, a violation of a specific Article of War, since the remedy in that case, which consists in the submission of charges and specifications for the alleged offense, is not only specific but exclusive.[2]

**737. Art. 30. Any soldier who thinks himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial.[3]**

The wrong complained of in this Article is one that arises in administration and not from acts which are properly triable by courts-martial with liability to punishment on conviction. It is required that the regimental commander shall summon a regimental court-martial for doing justice upon complaint being made. The functions of this court are only to "investigate" such matters as

[1] Dig. Op. J. A. G. 36. [2] Davis' Mil. Law, p. 224.
[3] See ante, par. 87–89.

are susceptible of redress by the doing of justice to the complainant, and such as are capable of being set right by stopping the wrongful condition which has been caused by the officer complained of. Erroneous stoppages of pay, irregularity of detail, more labor required of the individual than is required of other soldiers, and the like, are subjects of action under this Article.[1]

The appeal of either party to a general court-martial subjects him to the penalty of punishment at the discretion of that court if it finds the appeal groundless and vexatious. Yet, though such court may make a decision adverse to the party appealing, it may not find the appeal groundless or vexatious, but based upon honest grounds of belief, and an honest conviction of right. In such case, in deciding against the appellant, it should also acquit him of groundless and vexatious appeal, and so state in its findings.[2]

The words "any officer" in this Article have been construed to mean, in connection with other words of the Article, an officer within the command of the regimental commander, and the acts contemplated for which redress is to be given, to be those of company officers and especially company commanders.[3]

ABSENCES

**738. Art. 31. Any officer or soldier who lies out of his quarters, garrison, or camp, without leave from his superior officer, shall be punished as a court-martial may direct.**

This Article is intended to secure the presence of officers and soldiers at all times, in case of emergency, and is especially applicable to a time of war. The "superior officer" intended is the one having authority to grant such leave; and when it is to go beyond the limits of the

[1] See Court-martial Manual, p. 106, note.
[2] See Simmons, Court-martial, Sec. 344.
[3] Winthrop, Vol. 1, p. 858.

camp or garrison it should be given by the commander thereof; and, in case of a soldier, if it is to go for more than a mile from camp, it must be in writing.[1]

**739. Art. 32. Any soldier who absents himself from his troop, battery, company, or detachment, without leave from his commanding officer, shall be punished as a court-martial may direct.[2]**

The absence herein indicated is an absence from military supervision, that is, from the place where it is the soldier's duty to be, and where he can be found if wanted.

"Nothing can justify the absence of a soldier from the place assigned him but the leave, or command, of his commanding officer, specifically, or generally, given; and which the accused, in all cases, will be bounden to prove." [3] If granted a leave and the soldier overstays its limit he is "absent without leave" and must account therefor. He may, however, show as a good defense that it was caused by involuntary detention, inability to travel through sickness, etc., or any other agency beyond his power to control. But this cannot justify his absence if it first began in his own deliberate action of absenting himself without authority.

"This Article contemplates an absence from the soldier's troop, battery, company, or detachment,—an absence from the post or command. An unauthorized absence from quarters only, as from 11 P.M. inspection, is not properly chargeable under this Article"; [4] nor should failure to repair to the place of parade, exercise, or rendezvous, etc., be charged as an absence without leave under this Article, but under Article 33.[5]

An officer absent without leave is chargeable therewith under the 62d Article of War.

[1] See Art. 34.
[2] See ante, par. 297.
[3] Samuel, p. 338.
[4] Dig. Op. J. A. G. 374.
[5] Id. 376.

An enlisted man who absents himself from his post or company without authority will forfeit all pay and allowances accruing during such absence, and will be required to make good the time lost by such absence.[1]

If an officer or soldier, on returning to his station after an unauthorized absence, is, in consequence of his statements of fact connected therewith, placed upon or allowed to perform full duty, and not proceeded against by his proper military commander for the military offense involved, such action, under the general custom of the service, may be pleaded as a good defense should the officer or soldier be brought to trial for the unauthorized absence.[2]

The forfeiture by an enlisted man of his pay and allowances is by operation of law, as he renders no service and therefore earns neither during his absence; and the forfeiture accrues independently of the result of a trial for the military offense involved in the unauthorized absence.[3]

An officer absent without leave forfeits all pay during such absence, unless the absence is excused as unavoidable.[4] The excuse must be accepted by the commander vested with power to grant leaves for a period equal to or greater than the absence, and the discretion created by the statute must be exercised by him; his conclusions as to its character, as avoidable or unavoidable, are final and, unless appealed from, are not subject to review by higher authority.[5]

**740. Art. 33. Any officer or soldier who fails, except when prevented by sickness or other necessity, to repair, at the fixed time, to the place of parade, exercise, or other rendezvous appointed by his commanding officer, or goes from the same,**

[1] A. R. 131; G. O. 128, War Dept. 1908; see ante, par. 351–352; G. O. 80, War Dept. 1908; Act May 11, 1908.
[2] Dig. Op. J. A. G. 377.
[3] Id. 378.
[4] Sec. 1265, Rev. Statutes U. S.
[5] Cir. 5, War Department, Feb. 1, 1905.

**without leave from his commanding officer, before he is dismissed or relieved, shall be punished as a court-martial may direct.**

Under this Article only "sickness or other necessity" justifies the failure of any officer or soldier to repair at the fixed time to the place of parade, etc., appointed by his commanding officer; and he must not leave the same without leave from his commanding officer, before he is dismissed or relieved.

The sickness which will prevent repair to the place of rendezvous accrues prior to the necessity for repair thereto, and, in such case, should be acted upon by the proper medical officer, who will determine beforehand whether the necessity of the case prevents the repairing to the place of duty, and excuse the soldier if the circumstances of the illness warrant it. If an officer or soldier should leave his parade or other duty from sickness it should be reported without delay to the proper medical officer. Nothing but the most urgent necessity, and inability to ask and obtain the excuse from his commander, will justify an officer or soldier in leaving his parade, exercise, or other duty until relieved therefrom, or excused, by him. In either failure to repair to the place at the time designated or in leaving the same before being dismissed or relieved, without leave from his commanding officer, the case must be justified by surgeon's certificate, or other satisfactory evidence of the necessity.

**741. Art. 34. Any soldier who is found one mile from camp, without leave in writing from his commanding officer, shall be punished as a court-martial may direct.**

The object of this Article is to prevent straggling, marauding, etc., and to keep all soldiers within reasonable limits, which at the same time are sufficiently extended to afford room for recreation and procuring the conveniences for camp or quarters permitted to be sold to the Army.

A verbal permission given a soldier to go more than a mile beyond the limits of camp, or line of sentinels, though given by an officer, will not protect a soldier from arrest and trial; but verbal permission will be valid within those limits. A more restricted limit may be fixed by any commanding officer for the members of his command; this Article not prohibiting such restriction or conferring any right to the extreme limit which it prescribes.[1]

**742. Art. 35. Any soldier who fails to retire to his quarters or tent at the beating of retreat, shall be punished according to the nature of his offense.**

This Article not only requires the return of the soldiers to their quarters or tents at retreat, so that they may be verified, but it also intends that they shall remain there, subject to any call of emergency, through the night, unless absent with leave. It also affords a means of preserving order within the camp or garrison, the prevention of crimes by the arrest of persons outside their quarters without permission, the entrance of spies, etc.[2]

The "retreat" in our service is the second required roll-call for the day, the first being reveille, and the call is regularly sounded by the field musicians as prescribed in drill regulations, the exact hour therefor being fixed by the commanding officer. The "call to quarters," which requires the men to repair thereto for the night, is sounded at 10.45 P.M., and by 11 o'clock, at "taps," they must be in bed and the lights must be extinguished.[3] This regulation, therefore, grants the period between "retreat" and "call to quarters" during which men are at liberty to be outside their quarters, and is a modification of the original intent and restriction of the Article.

[1] Winthrop, Vol. 1, pp. 867–868; Simmons, Sec. 183.
[2] Samuel, pp. 545, 546.
[3] A. R. 376.

HIRING ANOTHER TO DO DUTY

**743. Art. 36. No soldier belonging to any regiment, troop, battery, or company shall hire another to do his duty for him, or be excused from duty, except in cases of sickness, disability, or leave of absence. Every such soldier found guilty of hiring his duty, and the person so hired to do another's duty, shall be punished as a court-martial may direct.**

This Article was originally intended to prevent the continuance of a custom which had grown up in the English army, by which soldiers were permitted to engage in work or labor outside the military establishment and to receive wages therefor; and the wages being more than their pay, they often hired others, comrades, to do their duty, leaving them to their civil employment.[1]

The custom is so manifestly detrimental to the proper instruction of men in the duties of a soldier, and so destructive of discipline, that, in modern times, it has not been thought of as at all permissible. Every man must, under this Article, perform his own duty except in cases of sickness, disability, or leave of absence. The excuse, when one of sickness or disability, must be granted after the action of the proper medical officer in each case, and the leave of absence must be granted by an officer having the authority to grant leave of absence from such duty.

**744. Art. 37. Every non-commissioned officer who connives at such hiring of duty shall be reduced. Every officer who knows and allows such practices shall be punished as a court-martial may direct.**

This Article still further forbids the hiring by a soldier of another to do his duty in that it provides for the punishment of any non-commissioned officer who connives at it, and of any commissioned officer who knows and allows such practices. The punishment by reduction of the non-commissioned officer, found guilty under this Article, is mandatory.

[1] See Samuel, p. 549.

### DRUNKENNESS ON DUTY

**745. Art. 38. Any officer who is found drunk on his guard, party, or other duty, shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct. No court-martial shall sentence any soldier to be branded, marked, or tattooed.[1]**

Drunkenness, as commonly defined, is the condition of a man whose mind is affected by the immediate use of intoxicating drinks.[2]

In military service it is held that the offense, under the above Article of War, is complete whether the party be found drunk as a result of drinking intoxicating liquor, or be found "under the influence of opium or other intoxicating drug or thing."[3] "It matters not what the quantity taken may be; if ever so little and the soldier becomes drunk, he is punishable."[4] Nor does the degree of drunkenness affect the result if there be any such intoxication as sensibly to impair the rational and full exercise of his mental and physical faculties.[5]

The offense is much more serious in the military than in the civil code, because of the fact that the responsibilities of the soldier are often very great, and drunkenness not only unfits the individual soldier for duty and is subversive of discipline, but, in time of war, might endanger the safety of the command.

The words "on duty" include not only duty on guard, parade, drill, police, or routine detail, etc., but also all descriptions and occasions of duty properly devolving upon an officer or soldier by reason of his office, command, rank, or general military obligation.[6]

[1] See ante, par. 275–277, and post, Art. 98, par. 805.
[2] Bouvier, Law Dict'y.
[3] Winthrop, Vol. 1, p. 873; Simmons, Sec. 157; Hough, p. 208; Davis' Mil. Law, p. 408; Dig. Op. J. A. G. 51.
[4] Hough, p. 208.
[5] Dig. Op. J. A. G. 50.
[6] Winthrop, Vol. 1, p. 874; Davis' Mil. Law, p. 408.

The post commander and post surgeon, being liable to be called upon in the performance of duty at any time, are on duty at all times, as is also an officer with his regiment in front of the enemy, or a commander of an expedition against hostile Indians. The post quartermaster is also "on duty" during the hours that he may properly be called upon to perform his duties, and the officer of the day, and all members of the guard during the entire period of such duty.[1] An officer reporting in person drunk, to the commanding officer to whom he has been ordered to report, on arrival at a post; or an officer reporting to the post commander, when drunk, for orders as officer of the day, after having been duly detailed as such, has been held chargeable under this Article.[2] But an officer absent from his command, or under conditions where he is not liable to duty, who becomes drunk, should be charged under the 62d Article of War, or, if the circumstances justify it, with "conduct unbecoming an officer and a gentleman" under the 61st Article.

The offense described in the Article is that of being "found drunk" on the duty and not of becoming so after entering thereon, but it is held that "a soldier found drunk when on duty was properly convicted under this Article, though his drunkenness actually commenced before he went on the duty; his condition not being perceived till some time after he had entered upon the same." [3] It is an offense, however, knowingly to allow a soldier to go on duty when under the influence of intoxicating liquor, and it is the duty of the proper officer making the detail, or in charge of the inspection thereof, or of the inspection of men before entering upon any duty, to reject such soldiers; and charges in such case should be drawn under the 62d Article

[1] Winthrop, Vol. 1, p. 875.
[2] Dig. Op. J. A. G. 45.
[3] Id. 43.

of War, as being so much under the influence of intoxicating liquor as to disqualify the accused from the proper performance of his duties.

"The drunkenness need not be such as to totally incapacitate the party for the duty; it is sufficient if it be such as sensibly to impair the full and free use of his mental or physical abilities. It is not a sufficient defense to a charge of drunkenness on duty to show that the accused, though under the influence of liquor, contrived to get through and somehow perform the duty." [1]

The charge and specification should specifically state in the words of the Article that the accused was "found drunk" on the duty. Under the statutory expression "found drunk" the word "found" cannot be omitted.[2]

Where the drunkenness was caused by morphine or other drug prescribed by a medical officer of the Army or civil physician, this may constitute an excuse for a breach of discipline committed by an officer or soldier, provided it clearly appears that this was the sole cause of the offense committed, the accused not being chargeable with negligence or fault in the case.[3] But the fact that it was prescribed by a medical officer or physician must be proved. The accused cannot justify the taking of any spirits or drug upon his own prescription, as neither an officer nor soldier is authorized to risk incapacitating himself for duty by taking medicine at his own discretion.[4] The plea may also be made under the foregoing Article, as rendering the accused inculpable, that the drunkenness was produced by the contrivance of enemies, and against the will or consent of the accused.

The punishment, in case of the conviction of an officer, is mandatory.

[1] Dig. Op. J. A. G. 49.
[2] See Bishop on Statutory Crimes, Sec 980.
[3] Dig. Op. J. A. G. 1234.
[4] Winthrop, Vol. 1, p. 877.

### GUARD DUTY: SENTINELS QUITTING GUARD

**746. Art. 39. Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall suffer death, or such other punishment as a court-martial may direct.**

The safety of the Army in time of war, and the security of persons and property under their charge in time of peace, depend upon the watchfulness and careful performance of their duty by sentinels. The heaviest penalties are, therefore, awarded for failure to properly perform the duties of a sentinel, and especially upon him who abandons his post or is found asleep thereon.

The responsibility of a soldier on duty as a sentinel is very great; his powers are, for that reason, correspondingly increased, and he represents for the time being the commanding officer in the execution of his orders and instructions. "A sentinel, in respect to the duties with which he is charged, represents the superior military authority of the command to which he belongs, and whose orders he is required to enforce on or in the vicinity of his post. As such he is entitled to the respect and obedience of all persons who come within the scope of the orders he is required to carry into effect." [1] "All persons, of whatever rank in the service, are required to observe respect toward sentinels." [2]

By "post" of a sentinel is meant not only the spot on which a sentinel stands when, on coming on duty, he receives his orders, or on which he is placed by the officer or non-commissioned officer who leaves him to the observance of his duties, but the word includes the whole extent of ground specially pointed out to him as the limits of his walk as a sentry.[3] And the quitting of his post is the *leaving it*, and being off his post any material distance.

[1] Davis' Mil. Law, p. 411.
[2] Manual of Guard Duty, 1902, par. 382.
[3] Simmons, Sec. 199.

In order that sentinels may be vigilant, provision is made to limit their period of duty,[1] and in our service sentinels will ordinarily be on duty two hours out of six. In severe weather or under exceptional conditions a sentinel may be relieved hourly or oftener.[2]

"It is no defense to a charge of 'sleeping on post' that the accused had been previously overtasked by excessive guard duty; or that imperfect discipline prevailed in the command and similar offenses had been allowed to pass without notice; or that the accused was irregularly or informally posted as a sentinel. Evidence of such circumstances, however, may, in general, be received in extenuation of the offense, or, after sentence, may form the basis for a mitigation or partial remission of the punishment."

"An officer who places or continues a soldier on duty as a sentinel when, from excessive fatigue, infirmity, or other disability, he is incompetent to perform the important duties of such a position, will ordinarily render himself liable to charges." [3]

The offense of a sentinel "leaving his post before being regularly relieved" should be charged under this Article, and since the penalty makes it a capital offense, it, therefore, cannot be tried by a summary court, such court not having jurisdiction in capital cases.

**Responsibility of Sentinels in Charge of Prisoners.**—A sentinel in charge of prisoners exercises his authority as derived "in part from analogy to the functions of a jailer at common law, and in part from the laws, regulations, and customs of the service which regulate the duties and responsibilities of sentinels in charge of prisoners. If, therefore, a prisoner in his custody attempts to escape, it is the duty of the sentinel to use his utmost endeavor

[1] See Manual of Guard Duty, 1902, par. 31–32.
[2] Field Service Regulations, par. 166, 199.
[3] Dig. Op. J. A. G. 55.

to prevent such escape, and he may not only use force for that purpose, but he may resort to every means in his power to frustrate such attempt. It is his duty first, however, to call upon the prisoner to halt, and in the use of force he is governed by the same restrictions which apply to officers of the law in a similar case." [1]

The rule of the common law is that an officer may shoot and kill an escaping *felon* who refuses to halt when called upon to do so; though the necessity for such action should be made to appear if inquired into judicially. But he is not justified in so shooting and killing in case of a simple misdemeanor.[2] In some States the foregoing rule has been modified by statute. Under Texas statutes, for instance, an officer is not justified in killing a prisoner to prevent his escape, even in case of felony, unless the officer's own life is threatened, or he is in danger of great bodily injury.[3]

In "military" offenses, however, the common law distinctions between felonies and misdemeanors are inapplicable.[4]

The sentinel also has a responsibility under military law, unknown to the civil officer, in his duty of obedience to the orders of his superior, under penalty of severe punishment if he fails to obey. His orders relative to prisoners, as promulgated by the Secretary of War, are to prevent their escape, and if a prisoner attempts to escape, to call, "Halt!"; and "If he fails to halt when the sentinel has once repeated his call, *and if there be no other possible means of preventing his escape,* the sentinel will fire upon him"; and in "firing upon him" is meant "firing to hit him." [5]

It has been held that "If a homicide be committed by a military guard without malice, and in the performance of his supposed duty as a soldier, such homicide is excu-

[1] Davis' Mil Law, pp. 411, 412.

[2] Hawley, Law of Arrest, pp. 28–31; Bishop, Cr. Proc., Vol. I, Sec. 159; Clark, Cr. Law, pp. 135–136; Am. and Eng. Enc. of Law, Vol. 2, p. 851; Id., Vol. 21, p. 205.

[3] Am. and Eng. Enc. of Law, Vol. 21, p. 206.

[4] Id., Vol. 21, p. 207, note 6; U. S. v. Clark, 31 Fed. Rep. 710.

[5] See Manual of Guard Duty, 1902, par. 364–367.

sable, unless it was manifestly beyond the scope of his authority, or was such that a man of ordinary sense and understanding would know that it was illegal." [1] "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." [2] "To aid military officers in the proper enforcement of the custody of prisoners, rules and orders have been publicly promulgated by the Secretary of War. Such rules and orders have the force and effect of statutory law." [3]

The duty of the sentinel is, therefore, obedience to the existing orders, as quoted above, and his responsibility for action in each case will be determined by the fact of his compliance or non-compliance with those orders.

Where the homicide is committed upon a military reservation the United States courts will have jurisdiction.[4] But if it is committed outside a military reservation, and within the jurisdiction of any State, its courts will have jurisdiction of the case, and justification for the act must be shown there. If not sustained on trial, there is recourse to be had by final appeal, through the highest court of the State, if it decides adversely, to the Supreme Court of the United States. The United States courts will not interfere, by issue of a writ of *habeas corpus*, to take such person from the custody of the State authorities in advance of, and to prevent, his trial by the State courts, provided there is reasonable question as to whether the act complained of was wanton and not done in the proper performance of duty;[5] but they will act upon an appeal from their final adverse decision. And if it appears that there is no reasonable question, through con-

[1] U. S. v. Clark, 31 Fed. Rep. 710; Com. v. Shortall, 206 Pa. 165; Am. Dig., 1904. A, p. 2174.
[2] Justice Brewer, In re Grimley, 137 U. S. 153.
[3] Judge Munger, In re Fair, 100 Fed. Rep. 153; see ante, par. 13.
[4] U. S. v. Clark, 31 Fed. Rep. 710.
[5] Drury v. Lewis, 200 U. S. 1; U. S. v. Lipsett, 156 Fed. Rep. 65.

flict of testimony, as to the fact that the accused was acting, without malice, in the supposed performance of his duty, the U. S. courts will issue the writ of *habeas corpus* and discharge the prisoner.[1]

**747. Art. 40. Any officer or soldier who quits his guard, platoon, or division, without leave from his superior officer, except in a case of urgent necessity, shall be punished as a court-martial may direct.[2]**

The "urgent necessity" in this Article has the same import as the words "sickness or other necessity" employed in Article 33, and the quitting of his guard, platoon, or division, for that reason, must be justified, in a like manner, by the certificate of a medical officer or other satisfactory evidence of the "urgent necessity." The word "guard" is not limited to the regular daily camp or post guard, but includes any formal guard, as an escort guard, guard for prisoners, etc.[3]

FALSE ALARMS

**748. Art. 41. Any officer who, by any means whatsoever, occasions false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as a court-martial may direct.**

This Article is intended not only to preserve peace and quiet in a command in order to insure needed rest from the fatigue of daily duty, but it protects the guard (whose duty it is to turn out on occasions of alarm of any kind) from undue annoyance and repeated calls for service which being found false and unnecessary might lessen their vigilance when prompt action was necessary.

The false alarm may be caused by "any means whatsoever," by words as well as by acts. But if there is reasonable ground for the alarm it will not constitute the offense when given, but on the contrary is a commendable act.[4] The "reasonable ground" must, however, be made clearly to

[1] U. S. v. Lipsett (Ex parte Gillette), 156 Fed. Rep. 65.
[2] See ante, par. 740. [3] Winthrop, Vol. 1, p. 870. [4] Samuel, p. 576.

appear in defense; the "intent" as well as the circumstances connected with the act may be considered in justification of it, or in awarding punishment or in mitigation thereof.

The Article refers to officers only; enlisted men would not be charged under this Article, but under an Article covering their misconduct.

MISBEHAVIOR BEFORE THE ENEMY, ETC.

**749. Art. 42. Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct.**

The "misbehavior" herein referred to is not that misconduct which may be charged as "conduct unbecoming an officer and a gentleman" under the 61st Article of War, but "military" misconduct, such as, or similar to, the acts specified in the Article, which show cowardice, lack of loyalty to his command, or give encouragement to the enemy, or any act tending to weaken the strength or to discourage the action of his own troops. "Misbehavior before the enemy may be exhibited in the form of cowardice, or it may consist of a wilful violation of orders, gross negligence or inefficiency, an act of treason or treachery, etc. It need not be committed in the actual sight of the enemy, but the enemy must be in the neighborhood, and the act of offense have relation to some movement or service directed against the enemy, or growing out of a movement or operation on his part." [1]

The "inducing others" may be by word or act, and directed either towards the commanding officer, or the officers or troops under his command.[2]

The term "post" has reference to any point or position held, whether fortified or not, which a detachment may

[1] Dig. Op. J. A. G. 56; see Winthrop, Vol. 1, pp. 888–889.
[2] Samuel, p. 611.

be ordered to occupy, or which it may be its duty to defend; and a "shameful" abandonment is one made unnecessarily, or if necessarily made consists in leaving the arms, equipment, and other public property to fall into the hands of the enemy when it might have been saved or at least destroyed to prevent its use by him.[1]

**750. Art. 43. If any commander of any garrison, fortress, or post is compelled, by the officers and soldiers under his command, to give up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death, or such other punishment as a court-martial may direct.**

The "compelling" indicated in this Article is that of direct force or compulsion and not of mere words of inducement as in the previous Article. This offense amounts to a palpable act of mutiny in taking by force from the commanding officer his right and power of command. The *animus* of the act, whether insubordination, cowardice, treachery, etc., is immaterial; no amount of suffering, privation, or sickness to which the garrison may be exposed through the determination of the commander to hold his post will avail as an excuse for the crime.[2]

FORBIDDEN RELATIONS WITH THE ENEMY

**751. Art. 44. Any person belonging to the armies of the United States who makes known the watchword to any person not entitled to receive it, according to the rules and discipline of war, or presumes to give a parole or watchword different from that which he received, shall suffer death, or such other punishment as a court-martial may direct.**

The countersign, in our service, is a word given to the officer of the day and of the guard, to sentinels authorized to pass persons in possession of it, and to persons of the command whose duties require them to pass the sentinels at night, and to such other persons to whom the com-

[1] Winthrop, Vol. 1, p. 891.
[2] Id., p. 897; Samuel, p. 608. For compulsion as a defense under this Article, see ante, par. 285.

mander may communicate it. The parole is a special check upon the countersign, given only to those who, by their office or duty, are entitled to visit and inspect guards or sentinels at night. It is used only as a means of identification and will not avail as a passport unless accompanied by the countersign.

The term "watchword" as used in this Article comprehends not only the countersign and parole,[1] but any preconcerted word or signal issued, by competent authority, for a similar purpose in the performance of guard or outpost duty. "As no specific intent is set forth in the statute, the offense may be committed through negligence or inadvertence, or with the intent to convey the watchword to the enemy; the offense would be complete in either case." [2]

The giving of a wrong watchword might prove as prejudicial as making a right one known, for, though it could afford no information to an enemy, it might induce disastrous confusion in the intended operations of our own armies.

**752. Art. 45. Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct.**

By "enemy" in this and the following Article is meant not only members of an opposing army but every subject of any foreign power, and all rebels, with whom we are at war. It applies to all those in hostile attitude or capable of action, but does not mean that the sick and wounded, captured from the enemy, shall not receive relief and the same medical care and treatment, if practicable, as those of our own troops, in accordance with the laws of war.[3]

The acts specified in these Articles would, if proved,

[1] Hough, p. 174.
[2] Davis' Mil. Law, p. 417.
[3] Hough, pp. 157–158; see ante, par. 656.

constitute treason, and prosecution could be had in the courts of the United States for that offense.

The word "whosoever" was formerly held to include civilians as well as persons in the military service, thereby making them amenable to trial and punishment by court-martial under either Article. But later decisions preclude the exercise of military jurisdiction over this class of offenses committed by citizens in places which are not under military government or martial law.[1]

**753. Art. 46. Whosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial may direct.**

The rule of "non-intercourse" with the enemy governs all soldiers and citizens in time of war, and no communication can be had except as authorized under the laws of war. Holding correspondence is, therefore, forbidden by those laws as well as by this Article, and the term includes all communication by letter, token, in print, or by telegram, telephone, or wireless telegraphy, and the offense is complete in the transmittal or attempted transmittal thereof. It is not essential that the communication should reach its destination.[2]

In "giving intelligence" to the enemy, however, it is essential that material information should be actually communicated to him; the communication may be verbal, in writing, or by signals.[3]

DESERTION

**754. Art. 47. Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.**[4]

[1] Dig. Op. J. A. G. 58 and note 5; see ante, par. 685.
[2] Winthrop, Vol. 1, p. 904; Dig. Op. J. A. G. 62.
[3] Dig. Op. J. A. G. 63.
[4] See ante, par. 186, 189, 306, 353. Every convicted deserter also forfeits his right of citizenship (Sec. 1996, 1998, R. S.) and his right to pension. (Act May 11, 1908; G. O. 80, War Dept. 1908.)

Evidence of the fact that an officer or soldier has "received pay," or of his "having been duly enlisted," is sufficient to show acceptance of the contract of service with the United States, in cases of a charge of desertion therefrom. In order to convict there must be proof of the enlistment, or the receipt of pay as a soldier, and also of the absence without leave, and an *intent not to return.*

"Desertion is an unauthorized absenting himself from the military service, by an officer or soldier, with the *intention of not returning.*" [1] It is the "intent not to return" that constitutes the gist of the offense; if the intention of returning remains always present the offense does not constitute desertion, but "absence without leave." The intent to abandon the service must, therefore, be proved, and this may be done by showing circumstances attending, or connected with, the absence which indicate whether there was an intention to return or not.

The absence may begin by the soldier directly absenting himself, or by his remaining absent from his service in not returning after an authorized absence therefrom.

An "escape" by a prisoner is not necessarily desertion; the intent to remain absent must be shown. But a considerable absence, and the necessity of apprehending him by force, is strong presumptive evidence of the intent necessary to constitute the crime.[2]

"Every desertion includes an absence without leave. Upon trial for desertion the accused is tried also for the absence without leave involved in the offense charged. If acquitted, without reservation, of the desertion, he is acquitted also of the lesser offense. If convicted, as he may be, of the lesser offense only, under a charge of the greater, he is acquitted in law of the latter." [3]

**Reward for Deserters.**—The amount of the reward (A. R. 120) or expenses paid for apprehending a deserter,

[1] Dig. Op. J. A. G. 1053. [2] Id. 1057. [3] Id. 1093.

and the expenses incurred in transporting him from the point of apprehension, delivery, or surrender, to the station of his company or detachment, or to the place of his trial, including the cost of transportation of the guard, will be set against his pay upon conviction of desertion by a court-martial, or upon his restoration to duty without trial. If convicted of absence without leave only, he will be charged with the expense incurred in transporting him to his proper station.[1] This stoppage is incident upon conviction, and need not be directed in the sentence.[2]

If a soldier be acquitted of desertion, or convicted of absence without leave only, any amount paid as a reward for his arrest will not be stopped against his pay unless, in case of conviction of absence without leave, the sentence of the court shall so direct.[3]

A deserter will make good the time lost by desertion, unless discharged by competent authority. He will be considered again in service from the date of his apprehension or surrender; but if a deserter enlists while in desertion, his services under such unlawful enlistment will not be counted as making good any of the time lost by desertion.

A deserter who is apprehended, or who surrenders before his term of enlistment has expired, is entitled to pay and allowances from the date of his return to military control. If his term of enlistment expires while in confinement awaiting trial or serving sentence, his pay and allowances cease from the date of the expiration of his term of enlistment and will not accrue again until he shall have been restored to a duty status.[4]

When the amount of the reward which has been paid for his apprehension is not stopped against the soldier the amount thereof comes from the item in the Army Appropriation Bill entitled "Quartermaster's Depart-

[1] A. R. 126. [2] See ante, par. 355. [3] A. R. 127. [4] A. R. 129.

ment: Incidental Expenses for the apprehension, securing, and delivery of deserters, including military prisoners, and the expenses incident to their pursuit." "In practice the word 'deserters' as here used is construed to include soldiers charged with desertion and is not limited to soldiers convicted of desertion. The reward would, therefore, be payable even though the soldier were subsequently discharged without trial." [1]

The right of the United States to arrest and bring to trial a deserter is paramount to any right of control over him by a parent or guardian on the ground of his minority.[2] But a minor, when not under charges or sentence, if enlisted without their consent, may be discharged by any United States court, upon application therefor, showing the facts, by the parent or guardian of such minor, entitled to his custody and control.

**Desertion of an Officer.**—The President is authorized by law to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for reappointment.[3] It is also held that an officer so dropped is not entitled to apply for trial by court-martial, under Sec. 1230, R. S., as in cases of summary dismissal by the President in time of war.[4]

STATUTE OF LIMITATION IN DESERTION[5]

**755. Art. 48. Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried.**

[1] Dig. Op. J. A. G. 1090.
[2] Id. 1094; In re Carver, 142 Fed. Rep. 623.
[3] Sec. 1229, R. S.
[4] See ante, par. 66, 335.
[5] See Chap. XXXI, Art. 103, par. 810, post; ante, par. 65, 186–193.

The liability to make good to the United States the time lost in desertion, herein enjoined, is independent of any punishment which may be imposed by court-martial on conviction of the offense; it need not, therefore, be adjudged or mentioned in the sentence.[1]

The time passed by a deserter in arrest or confinement under sentence cannot be required to be made good to the United States; such time not being a time of military service, but of punishment.[2] But time lost through desertion must be made good if the deserter accepts pardon, or restoration to duty, without trial.[3] If, however, he is tried and the sentence is disapproved, the effect is the same as an acquittal, and the obligation of additional service is not incurred.[4]

The United States may waive the liability imposed by the Article to make good the time lost in desertion, and it is in fact waived when the deserter, without being required to perform the service, is legally discharged by proper authority, or dishonorably discharged through the duly approved sentence of a court-martial.[5]

The liability to trial and punishment is subject to the provisions of the statute of limitation.[6]

**756. Art. 49. Any officer who, having tendered his resignation, quits his post or proper duties, without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of the same, shall be deemed and punished as a deserter.**

An officer of the Army, being in the service of the United States, cannot legally separate himself therefrom of his own volition. By sending in his resignation he does not thereby sever himself from his service or duty. His separation takes effect only when such resignation has been accepted and he has received due notice of such acceptance. If, therefore, he quits his post or proper

[1] Dig. Op. J. A. G. 64 and note; A. R. 129. [2] Dig. Op. J. A. G. 66.
[3] Id. 71–72. [4] Id. 64. [5] Id. 68; see ante, per. 360.
[6] See ante, par. 65, 360; post, Chap. XXXI, Art. 103, par. 810.

duties before such notice, with the intent of remaining permanently absent therefrom, he is guilty of desertion. The "intent" is the important element of the offense, and may be proved, as in the case of enlisted men, by the circumstances connected with the leaving and the absence.

**757. Art. 50. No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on a penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him and give notice thereof to the corps in which he last served, the said officer shall, by a court-martial, be cashiered.**[1]

Deserters from one organization of the Army do not compensate for their offense by enlisting for service in another. The penalty for such an act is that of being reputed and punished as a deserter from the first organization. The re-enlistment in another organization is *prima facie* evidence of desertion, in that it shows an evident intent not to return to his proper command and duty from which he has absented himself without leave.

"An enlistment in violation of this Article is not void, but voidable at the option of the United States only. Until so avoided service under it is valid service. On trial for an offense committed during such enlistment, a plea by the accused, in bar of trial, that this enlistment, being fraudulent on his part, is void, should not be sustained."[2]

To prevent and punish the act herein prohibited it is

[1] The charge of desertion should be laid under the 47th Art. of War, and be an additional specification thereto, in form as follows:

"Specification 2. In that Private A— B—, Troop —, U. S. Cavalry, *alias* Private C— D—, Co. —, — U. S. Infantry, a soldier in the service of the United States, did desert the same at ——, on or about the —— day of ——, by enlisting under the name of C— D— in Co. —, — U. S. Infantry, without a regular discharge from said troop of cavalry."

If objection thereto is taken, the terms of Art. 50 shall be offered in evidence or the judicial notice of the court be invited thereto (Cir. 76, War Dept. 1908).

[2] Dig. Op. J. A. G. 76.

made the duty of any officer knowing of it, or discovering such deserter, immediately to confine him and give notice thereof to the corps in which he last served, under penalty of being "cashiered," and such sentence is mandatory upon conviction.

**758. Art. 51. Any officer or soldier who advises or persuades any other officer or soldier to desert the service of the United States, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.**

"To constitute the offense of 'advising to desert,' it is not essential that there should have been an actual desertion of the party advised. But it is otherwise as to the offense of 'persuading to desert'; to complete this offense the persuasion should have induced the act." [1]

By provision of law, Whoever entices or procures, or attempts, or endeavors to entice or procure, any soldier in the military service of the United States, or who has been recruited for such service, to desert therefrom, or who aids any such soldier in deserting, or attempting to desert from such service, or who harbors, conceals, protects, or assists any such soldier who may have deserted from such service, knowing him to have deserted therefrom, or who refuses to give up and deliver such soldier on the demand of any officer authorized to receive him, shall be punished by imprisonment not more than three years, and by a fine not exceeding two thousand dollars.[2] The trial in such case is by courts of the United States, and not by court-martial.

### DIVINE SERVICE; PROFANITY

**759. Art. 52. It is earnestly recommended to all officers and soldiers diligently to attend divine service. Any officer who behaves indecently or irreverently at any place of divine worship shall be brought before a general court-martial, there to be publicly and severely reprimanded by the president thereof. Any soldier who so offends shall, for his first offense, forfeit one**

[1] Dig. Op. J. A. G. 77. [2] Sec. 42, Act March 4, 1909, 35 St. L. 1097.

**sixth of a dollar; for each further offense he shall forfeit a like sum, and shall be confined twenty-four hours. The money so forfeited shall be deducted from his next pay, and shall be applied, by the captain or senior officer of his troop, battery, or company, to the use of the sick soldiers of the same.**

All officers and soldiers are recommended to attend divine service, but, in accordance with the spirit of our institutions, there being no "state church" or required religion, each one is free to follow his own religious convictions. This freedom to worship the Supreme Being according to one's own convictions is entitled not only to respect but protection, and any indecent behavior at any place of divine worship makes the officer or soldier offending subject to trial by court-martial, and punishment under this Article. The general sense of respect for the individual and collective religious belief of others is, however, so universal that this Article is practically obsolete.

**760. Art. 53. Any officer who uses any profane oath or execration shall, for each offense, forfeit and pay one dollar. Any soldier who so offends shall incur the penalties provided in the preceding article; and all moneys forfeited for such offenses shall be applied as therein provided.**

The prohibition of the use of profane oaths or execrations is of like tenor with the purpose of the preceding Article in its requirement of observance of reverence for the Deity and a respect for the feelings of those to whom profane words are distasteful and obnoxious.

### PRESERVATION OF ORDER; PROTECTION OF PROPERTY, ETC.

**761. Art 54. Every officer commanding in quarters, garrison, or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; and if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot, to the disquieting of the citizens of the**

**United States, he refuses or omits to see justice done to the offender, and reparation made to the party injured, so far as part of the offender's pay shall go toward such reparation, he shall be dismissed from the service, or otherwise punished, as a court-martial may direct.**

A discussion of this Article and a statement of the method of procedure under it has already been made in Chapter XXVIII, par. 531–536.

**762. Art. 55. All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish ponds, houses, gardens, grain fields, inclosures, or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States, (unless by order of a general officer commanding a separate army in the field,) shall, besides such penalties as he may be liable to by law, be punished as a court-martial may direct.**

This Article, intended to prevent the wasteful, wanton, or malicious destruction of property belonging to the inhabitants of the United States, makes a special exception in its provisions for the protection of any officer or soldier destroying such property by order of "a general officer commanding a separate army in the field," and it, therefore, permits of such order being pleaded in bar of trial; the responsibility for the acts being transferred to the general officer giving the order.[1]

The person offending, in addition to his military responsibility, is liable to such penalty as may be inflicted under the laws of the land applying to such acts as are herein named.

**763. Art. 56. Any officer or soldier who does violence to any person bringing provisions or other necessaries to the camp, garrison, or quarters of the forces of the United States in foreign parts, shall suffer death, or such other punishment as a court-martial may direct.**

The tendency to violence on the part of troops would

[1] Davis' Mil. Law, p. 437.

probably be greater in foreign parts than in their own country, and therefore the necessity for their restraint under severe penalty when so serving. The "violence" would apply to any act punishable at the common law, such as robbery, or assault by any form of physical attack, upon the persons as to whom it is prohibited. The protection extends to the party bringing provisions, etc., not only while within the limits of the camp or garrison, but while going to or returning therefrom.[1]

**764. Art. 57. Whosoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their Territories during rebellion against the supreme authority of the United States, forces a safe-guard, shall suffer death.[2]**

The word "safe-guard" has a meaning distinct and separate from that of a sentinel or guard. "By the laws of nations, a 'safe-conduct' or 'safe-guard' has ever been respected, and the violation thereof resented with the keenest jealousy, more so even than the infraction of a flag of truce." [3]

The grave character of the offense is indicated by the severe penalty of death, which is mandatory upon conviction of the accused. "The crime consists in the contempt of the supreme military authority, to the endangering of the public interests; whether such authority be exercised directly or representatively." [4]

It is essential to conviction of the offense that it be proved that the accused had knowledge of the fact of the safe-guard, either from the person bearing it, the sentinel, or other guard acting as such, or by its publication so that it had come to his personal knowledge before its violation.

[1] Samuel, p. 566.
[2] See ante, par. 330.
[3] Simmons, Sec. 204.
[4] Samuel, p. 569.

JURISDICTION OF COURTS-MARTIAL IN TIME OF WAR

**765. Art. 58. In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or District in which such offense may have been committed.** [1]

The jurisdiction conferred upon courts-martial by this Article has been held to be not exclusive, but concurrent with that of civil tribunals; the word "shall" in the term "shall be punishable" is construed as equivalent to *may*.[2]

By the terms of the Article its provisions are limited to "time of war, insurrection, or rebellion," and to "persons in the military service of the United States"; the sentences being those of a military court and not of a civil court, civil disability does not attach to the person upon conviction.[3]

Though the punishment must not be "less," it may legally be of greater severity than that provided by the local statute.[4]

While the various crimes are enumerated, there is no statutory provision as to what shall constitute the crime, and therefore we must look to the common law definitions of them to ascertain the elements and facts necessary to be proved to constitute the offense in each case.

**Larceny.**—Larceny, at common law, is the felonious taking and carrying away of the personal property of another without his consent and against his will, with the intent to convert it to the taker's own use, or to

[1] See ante, par. 60 and 316, et seq., and Sec. 272-289, Act March 4, 1909, 35 St. L. 1142-1145.

[2] Dig. Op. J. A. G. 87. [3] Id. 93. [4] Id. 90.

deprive the owner of the property. The taking must be felonious, that is, with the "intent" of stealing; a simple removal of property with no such intent would be trespass only.[1]

Under the common law as received from England, larceny was divided into two classes, grand and petit. The distinction between the two lies in the the value of the property taken.

The offense of taking, etc., is the same in each, but petit larceny is now classed, in most of the United States, as a misdemeanor and is determined by statute which fixes a limit of value of the property taken necessary to constitute grand larceny.

Where there is a statute defining petit and grand larceny and fixing the limits of the value of property taken which will constitute each, the court-martial, in awarding punishment, should take into consideration the value of the property taken as proved by the evidence, and base its sentence upon the laws, relating to the offense, of the locality where it was committed. In all charges and specifications, therefore, drawn for the offense of "larceny" not only the articles taken should be named but their value be stated, and proved to the court.[2]

**Robbery.**—Robbery, at common law, is the felonious and forcible taking of anything of value, the property of another, from his person, or in his presence, against his will, by violence or by putting him in fear. It is, therefore, larceny accompanied by violence against a person, or by putting him in fear.[3]

The *animus furandi*, or felonious intent, must be present, which, taken together with the force used against the person, or the putting him in fear, constitutes the offense

[1] See Bouvier, Law Dictionary, Rev. Ed., Sec. 287, Act March 4, 1909, 35 St. L. 1144.

[2] See Form, Appendix E, 1.

[3] Wharton, Cr. Law, Sec. 846; Am. and Eng. Enc. of Law, Vol. 24, p. 992. See Sec. 284, Act March 4, 1909, 35 St. L. 1144.

and must be charged and proved by the evidence. The larceny element of the offense in robbery is not divisible into grand and petit; it is necessary, however, to show that the articles taken had a value.

**Burglary.**—Burglary, at common law, is the breaking and entering the dwelling-house of another in the night-time, with intent to commit a felony therein,[1] and the offense is complete whether the intended felony be executed or not.[2]

There must be a "breaking" as well as an "entry." Actual "breaking" as applied to burglary means the making of an opening or mode of entrance into a building by force, but does not necessarily contemplate the destruction of any of its parts. The lifting of a latch, or drawing of a bolt, removing a pane of glass or a grating, or pushing open a screen door closed by spring hinges, and the slightest force applied, have been held to constitute a "breaking." [3]

There is a constructive breaking where admission is gained by fraud, artifice, conspiracy, deceit, or threats, there being no actual force used.[4] But where an entry is made by consent of the person occupying the house, the offense cannot be established.[5]

In common law the offense must have been committed at night, and the building be a "dwelling-house"; and by this is meant a place used for habitation, and it includes the entire cluster of buildings, not separated by a public way, which are used for purposes connected with habitation.[6]

It is not essential to constitute the crime that the occupant should be actually in the house at the time.[7]

[1] Bishop, New Cr. Law, Vol. 1, Sec. 559.
[2] Am. and Eng. Enc. of Law, Vol. 5, p. 44.
[3] Id., pp. 45–46.
[4] Id., p. 17.
[5] Id., pp. 50–51.
[6] Id.; Bishop, New Cr. Law, Vol. 1, Sec. 577 (4).
[7] Am. and Eng. Enc. of Law, Vol. 5, p. 53, note.

The common law definition of burglary has been modified by statutes in the different States so as to include offenses committed by day as well as by night, and in other buildings than dwelling-houses, and various degrees of the crime have been established, with corresponding degrees of punishment. But the common law definition still prevails before courts-martial.

The fact of the breaking and entry of a dwelling-house at night, with intent to commit felony, must be proved before the court. The intent may be shown from the circumstances attending the commission of the offense. Where such intent cannot be established the act of forcible entry constitutes a trespass.[1]

**Arson.**—Arson is the wilful and malicious burning of another's house.[2] The offense, originally limited by common law to the "house" of another, has been made by statutes to include the burning of shops and other structures not used for habitation.[3]

The "house" of another must be burned to constitute arson at the common law, but the term "house" comprehends not only the very mansion-house, but all out-houses which are a parcel thereof, though not contiguous to it or under the same roof, such as a barn, stable, cow-house, sheep-house, dairy-house, well-house, and the like, being within the curtilage, or same common fence, as the mansion itself.[4] By "curtilage" is meant the space immediately surrounding a dwelling-house, contained within the same enclosure.

A "dwelling-house" is any structure occupied wholly or in part by any person or persons as a place of abode, together with all out-houses connected therewith and

[1] Davis' Mil. Law, p. 445.
[2] Bishop, New Cr. Law, Vol. 1, Sec. 559.
[3] Id., Sec. 564; Clark, Cr. Law, pp. 226, 229.
[4] Bouvier, Law Dictionary; Clark, Cr. Law, p. 227. See Sec. 285 Act March 4, 1909, 35 St. L. 1144.

situated within the curtilage.[1] Temporary absence, or any absence with intent to return, does not affect the character of the house.[2]

There must be an actual burning to constitute the offense, but it is not necessary that the building be wholly consumed or even materially injured. If any part, however small, is consumed it is sufficient, and "charring" constitutes "burning."[3]

When committed upon territory within the exclusive jurisdiction of the United States, or upon the high seas, or other waters within its jurisdiction and out of the jurisdiction of any State, the offense of arson is punishable under statutory provisions by imprisonment for not more than twenty years;[4] and where any building, timber, vessels, or property other than that which can be classed under the head of "dwelling-house" is maliciously set fire to or burned, the penalty is a fine of not more than five thousand dollars, and imprisonment not more than twenty years.[5]

The "intent" which is an essential part of the offense must be proved in order to convict the accused of the crime.

**Mayhem.**—Mayhem, at common law, is the act of unlawfully and violently doing injury to any part of a man's body, whereby he is rendered less able, in fighting, to defend himself or annoy his adversary.[6] If the injury merely disfigures him without impairing his physical abilities it is not mayhem. But, by statute the offense has been extended to cover injuries which are merely disfiguring;[7] and is a felony under United States laws and those of some States, and a misdemeanor in others, so that

[1] Am. and Eng. Enc. of Law, Vol. 2, p. 925.
[2] Id., p. 927.
[3] Id., p. 923.
[4] Sec. 272, 285, Act March 4, 1909, 35 St. L. 1143, 1144.
[5] Sec. 272, 286, Id.
[6] Clark, Cr. Law, p. 182; Bishop, New Cr. Law, Sec. 547.
[7] See Sec. 283, Act March 4, 1909, 35 St. L. 1144.

the punishment therefor varies with the status of the offense under the laws of the State in which the offense is committed.

**Homicide.**—Manslaughter and murder are both included in the general term "homicide."

Homicide is the killing of any human being, and it may be either "excusable," "felonious," or "justifiable."

Excusable homicide is that which takes place under such circumstances of accident or necessity that the party cannot strictly be said to have committed the act wilfully and intentionally, and whereby he is relieved from the penalty annexed to the commission of felonious homicide,—as in the accidental killing of a person while driving a horse which gets beyond control, or where the danger was seen but with due care on his part the driver could not avoid it.

Felonious homicide is that committed wilfully, under such circumstances as render it punishable, as where there is an intent to commit a felony, and in carrying it out a person is killed.

Justifiable homicide is that connected with a full intent but under such circumstances of duty as to render the act one proper to be performed. An example of such homicide is the taking of life in execution of the law, or the killing of a member of the belligerent force of an enemy in war.[1]

**Manslaughter.**—Manslaughter, at common law, is the unlawful killing of another, without malice, either express or implied. It is distinguished from murder by the absence of malice.

It has been divided by writers on criminal law, and by U. S. Statute, into two classes, voluntary and involuntary.[2]

Voluntary manslaughter is such as happens voluntarily or with an intention to produce injury, and it is that which is committed in the heat of sudden passion, or in the course

[1] Bouvier, Law Dictionary.
[2] Sec. 274, Act March 4, 1909, 35 St. L. 1143.

of sudden quarrel, or under, and as a result of, immediate and strong provocation. The provocation, however, must not be sought or induced as an excuse for killing or doing bodily harm, and must be such as the law deems adequate to deprive a reasonable man of the power of self-control, but it need not be such as to entirely dethrone the reason; and no provocation will reduce homicide to manslaughter if the accused was actuated by malice. Mere words or gestures, however insulting or abusive, or trespass or injury to property, or breach of contract, will not constitute sufficient provocation to reduce homicide to manslaughter.[1]

Involuntary manslaughter is where death is unintentionally caused, either (*a*) in the commission of an unlawful act not amounting to felony, nor likely to endanger life, or (*b*) by culpable neglect of a legal duty, as by negligence in performing a lawful act, or by neglect to perform an act required by law, or in committing a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.[2]

If a person, in doing a lawful act, culpably neglects to take precautions to prevent injury, and by reason of such neglect another is killed, it is involuntary manslaughter. So a person charged with a legal duty, as a railroad employee whose duty it is to signal trains or manage switches, or to warn persons at railroad crossings of the approach of trains, is guilty of manslaughter if he neglects to perform it, and death results.[3]

The duty must be a legal one as distinguished from a moral duty. It might be a moral duty to rescue a man from drowning, but it would not be manslaughter if a person failed to do so.

Where a military superior, in enforcing discipline, is induced to take the life of an inferior, when less extreme measures of prevention or restraint are available, his

[1] Clark, Cr. Law, pp. 165–172.
[2] Id., p. 172. Sec. 274, Act March 4, 1909, 35 St. L. 1143.
[3] Clark, Cr. Law, p. 177.

act is without justification, and he is guilty of manslaughter; so also where a superior. by the exercise of an unduly severe measure of discipline, or the infliction of an excessive punishment, causes presently or eventually, the death of an inferior, he is chargeable with involuntary manslaughter. And the legal crime will be the same where the superior causes the death of another by reason of negligence, in not properly regulating the use of firearms in his command,—as in target firing or artillery practice.[1]

**Murder.**—Murder is the unlawful killing of another human being, with malice aforethought.

A homicide is committed with malice, either express or implied, when there is an actual intention to cause the death of the person killed or of some other person, or to cause such bodily injury as the doer of the act knows is likely to cause death, or as is sufficient to cause death in the ordinary course of nature. It also exists where one deliberately perpetrates a cruel and wanton act against another resulting in his death, or where death is unintentionally caused in the commission of another felony, or where death is caused in resisting a lawful arrest, or a lawful attempt to suppress a riot or affray. Murder is a felony at common law, and is punishable by death.[2] Where death results eventually from injury done it must occur within a year and a day after the date of the act to constitute murder.

Where the act is committed in one State or district and the death occurs in another, the place where the blow is received and the act took effect is the place of the murder or homicide. Thus, when a person on one side of a boundary line shoots a person on the other side he is amenable in that jurisdiction where the shot was received.[3]

The "malice aforethought," express or implied, is essential to the crime. In the sense here used, "malice" does

[1] Winthrop, Vol. 1, p. 968. [2] Clark, Cr. Law, pp. 158-159.
[3] See Wharton, Cr. Law, Vol. 1, Sec. 279; Bishop, Cr. Proc., Vol. 1, Sec. 52. Sec. 336, Act March 4, 1909, 35 St. L. 1152.

not necessarily mean hatred, or personal ill-will, nor an actual intent to take life; it signifies the intent from which flows any unlawful and injurious act, committed without legal justification, and is sometimes a mere inference of law from facts proved.[1] It may be established by independent testimony, or may be inferred when the fact of the killing is proved by satisfactory evidence, and there are no circumstances disclosed tending to show justification or excuse, and there is nothing to rebut the natural presumption of malice.[2]

The *corpus delicti*—the fact that the crime has actually been committed—must first be proved. On a charge of homicide, the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body and his guilty agency in the criminal act be established.[3] Should the death be satisfactorily proved, the identification of the body thereafter may be dispensed with.[4] By the statutes of the United States "murder" has been separated into two degrees; the penalty, on conviction in the first degree being death, and in the second degree imprisonment not less than ten years, and may be for life.[5]

**Assault and Battery with Intent to Kill.**—An "assault" is an attempt or offer to do unlawful corporal hurt to another by violence. A "battery" is where the attempt or assault is so far carried out that some force, however slight, is applied to the person assaulted.[6]

[1] Bishop, New Cr. Law, Sec. 429; Clark, Cr. Law, p. 159.
[2] Davis' Mil. Law, pp. 445–446.
[3] Starkie on Ev., 10th Ed., p. 861; Wharton, Cr. Ev., Sec. 324–325.
[4] Wharton, Cr. Ev., Sec. 326.
[5] Murder perpetrated by poison, lying in wait, or any other willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is in the second degree. Sec. 273, 275, Act March 4, 1909, 35 St. L. 1143.
[6] Clark, Cr. Law, pp. 198–199. Sec. 276, Act March 4, 1909, 35 St. L. 1143.

To constitute a criminal assault there must be at least an apparent present ability to commit the battery. Mere preparations, or mere words and threats, whatever may be the intention, can never amount to an assault; there must be some act which if not stopped may apparently, or actually, produce injury.[1]

Under this Article of War the "intent" to kill is an essential part of the offense, and this may be inferred from the character and the circumstances of the assault, the use of a deadly weapon, and the other circumstances connected with it. It is not necessary that death ensue.

The proof of the offense under the charge must be such as to establish the fact that if death had resulted from the act the accused would be convicted of either murder or manslaughter.[2]

**Wounding by Shooting or Stabbing, with Intent to Commit Murder.**[3]—This contemplates an aggravated assault and battery with a weapon by means of which a person is either shot or stabbed, and is especially directed against the unlawful use of those weapons most likely to be in the hands of a soldier. This form of injury, together with the malice attending the act, which accompanies the intent to commit murder, and which distinguishes that crime from manslaughter, must be alleged and proved.

**Rape.**—Rape is the carnal knowledge of a woman by a man forcibly and unlawfully against her will. The force may be actual or constructive, and the act must be without consent on the part of the woman. Girls under ten years of age at common law, and under certain ages as regulated

[1] "The drawing of a sword or bayonet, or even holding up a fist in a menacing manner, throwing a bottle or glass with intent to wound or strike, presenting a gun at a person who is within the distance to which the gun will carry, pointing a pitchfork at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person of another, will amount to assault." (Clark, Cr. Law, p. 199, note; 1 Russ. on Crimes, 1019.)

[2] Am. and Eng. Enc. of Law, Vol. 2, pp. 969–970, notes.

[3] See Sec. 276, Act March 4, 1909, 35 St. L. 1143.

by the statutes of the different States, are incapable of giving consent. The penalty under U. S. statute is death.[1]

To prevent the act from being rape in any case consent must be consciously given by a woman of capacity to consent, in possession of her rational powers and intelligence. There is no consent if the woman is insane, or is drunk, or under the influence of a drug which incapacitates her from intelligent use of her faculties.

**Assault and Battery with Intent to Commit Rape.**—The offense of assault and battery in this case is combined with an intent to commit rape and to overpower resistance.[2] If the intent existed and be proved the fact that the accused afterward desisted or changed his mind will not affect the crime. Intent will be demonstrated by the character and degree of violence employed, the language used, the acts and circumstances of the attempt.[3] But the evidence must establish the intent beyond a reasonable doubt.

In all the offenses charged under this Article the allegation of "intent" is essential in the charges, and must be proved by the evidence in order to sustain the charge. Where the offense charged includes a lesser kindred one the finding of not guilty of the offense charged but guilty of the lesser offense may be made; thus, under a charge of murder there may be a finding of guilty of manslaughter only; under a charge for robbery there may be a finding of guilty of larceny; and so for each offense which includes a lesser kindred one. But there can be, in the finding, no separation of any specific crime into *degrees* thereof,—as a finding of guilty of murder in the second degree under a charge of "murder,"—since the military code does not recognize degrees of the specific crimes mentioned in this Article.[4] But in view of the

[1] Sec. 278, Act March 4, 1909, 35 St. L. 1143.
[2] See Sec. 276, Id. [3] Winthrop, Vol. 1, p. 989. [4] Id.

separation of the crime into two degrees, with different penalties, by U. S. statute, courts-martial should take this recent law into consideration in awarding punishment.[1]

The fixing of a minimum punishment, to be adjudged by the court-martial, leaves it discretionary with the court to *add* to such punishment if it thinks proper, and if such addition be practicable.[2] Whenever the civil statute establishes a maximum and a minimum punishment for the offense the Article will be satisfied by a sentence to the minimum term thus established, though the sentence *may* exceed the maximum. Where a maximum punishment only is established, as that the offender shall be punished by imprisonment *not to exceed* a certain number of years, or by a fine *not to exceed* a certain sum named, then as any degree of the punishment within such limit is legal, the court-martial is without any restriction, under the Article, as to the term or amount it shall impose by its sentence.[3]

The local laws of a foreign country in the military occupation of the United States in time of war are not "laws of any State, Territory, or District," within the meaning of this Article, and its provisions will not apply in such case.[4]

RESPONSIBILITY FOR CERTAIN CRIMES AND OFFENSES

**766. Art. 59. When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil magis-**

[1] See ante, p. 393.
[2] Winthrop, Vol. 1, p. 990
[3] Id., p. 991.
[4] Dig. Op. J. A. G. 92.

**trates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.**[1]

It is a fundamental principle of government under our Constitution that, in time of peace, the civil power shall be supreme, and military authority subject thereto.[2]

In the application of this principle, however, is included the fact that the government of the United States and that of a State are distinct and independent of each other within their respective spheres of action, although existing and exercising their powers within the same territorial limits.[3] Therefore each must be recognized by the other. In all territory within the exclusive jurisdiction of the United States its own courts have unquestioned jurisdiction; the courts of a State can exercise jurisdiction over persons residing or being within those limits only for crimes committed outside thereof, and this Article provides a means by which offenders may be secured and brought to trial before State courts for their offences against State laws, when taking refuge within places subject to military jurisdiction. But the Article does not apply as to offenses punishable by the courts of a foreign country.[4]

The Territories of the United States being governed under the direct provisions of Congress enacted therefor, the judicial power is derived from such laws, and the courts thereof are vested, in all cases arising under the Constitution and laws of the United States, with the same jurisdiction as the United States circuit and district courts;[5] and the officers and soldiers of the Army within a Territory are subject to its criminal laws equally with other citizens.

A Territorial statute is operative upon a military reservation within the Territory so long as it does not conflict with the laws of the United States, or with the military

[1] See ante, Chapter IX.
[2] See Dow v. Johnson, 100 U. S. 169.
[3] Tarble's Case, 13 Wall. (80 U. S.) 397.
[4] See 23, Op. Att'y-Gen. 120.
[5] Sec. 1910, Rev. Stat.

administration or legitimate operations of the Government.[1]

**767. Art. 60. Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or**

**[2] Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or**

**[3] Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or**

**[4] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or**

**[5] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or**

**[6] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or**

**[7] Who, having charge, possession, custody or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person3 having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or**

**[8] Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the**

[1] Dig. Op. J. A. G. 2437–2439. For discussion of the method of procedure, etc., under this Article, see ante, Chapter IX.

**truth of the statements therein contained, and with intent to defraud the United States; or**

**[9] Who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof; or**

**[10] Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same,**

**Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.**[1]

This Article gives jurisdiction to courts-martial over a number of offenses which involve a fraud on or an intent to defraud the United States.

The first two sections, in connection with the final section, provide for the punishment of any person in the military service of the United States who makes or causes to be made, or presents or causes to be presented, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent. The 3d and 4th sections, likewise, in connection with the final section, provide for the punishment of any such person who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim, or who, for the purpose of obtaining, or aiding others to obtain, the approval, allow-

[1] See Chapter 5, Act March 4, 1909, 35 St. L. 1104–1111.

ance, or payment of any claim against the United States, or any officer thereof, makes or uses, or procures or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statement. This includes the duplication and presentation of pay accounts, where it involves a false or fraudulent claim against the United States, or the presenting for payment of false vouchers, or the signing or approving of untrue certificates, vouchers, accounts, etc.; the procuring of such writings, by means of misrepresentation and deceit, to be approved by superior officers; the procuring of false receipts, vouchers, or statements to be signed by third parties.[1]

The 5th section provides a punishment for making false oath to any fact or to any writing or other paper, knowing it to contain any false or fraudulent statement.

False swearing is a false declaration on oath, which, while not within any common law or statutory designation of perjury, is by statute rendered otherwise indictable.[2] In military service this offense is chargeable under the 62d Article of War.[3]

The oath indicated, while not perjury at common law, is made a statutory offense by this Article, and is closely assimilated to perjury in some of its requisites. Thus, the oath, as in perjury, should be to some material point,—that is to say, to some writing or statement in whole or in part pertinent to the proof or prosecution of the claim presented,—and should be taken before a magistrate or other civil official legally authorized to administer an oath.[4] Where, by law, a military as well as a civil official is authorized to administer an oath, false swearing may be chargeable under this Article.

[1] Winthrop, Vol. 1, p. 1007.
[2] Bishop, New Cr. Law, Vol. 2, Sec. 1014.
[3] See Art. 62, par. 769.
[4] Winthrop, Vol. 1, p. 1008.

The advising or procuring of the making of a false oath is assimilated to subornation of perjury. But the oath herein taken and violated does not constitute perjury.

Perjury, at the common law, is the wilful giving, under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry.[1]

Subornation of perjury is the procuring of another to commit legal perjury. To complete the offense the perjury must be actually committed.[2]

"False swearing, as the term is used in the order prescribing maximum punishments, means (*a*) taking a false oath in a military judicial proceeding as to a matter not material to the issue; (*b*) taking a false oath otherwise than in a judicial proceeding, before a person legally authorized to administer the oath and under circumstances affecting the interests of the military service." [3]

False swearing by an officer or enlisted man before a court-martial, knowing the same to be false, whether or not as to matter material to the issue, is conduct to the prejudice of good order and military discipline and is cognizable and punishable under the 62d Article of War.[4]

To sustain the charge of perjury, the evidence of two witnesses, or of one witness with strong corroborating circumstances, is necessary to prove the falsity of what was testified.[5] But this rule as to the amount of evidence necessary to sustain an indictment for perjury does not govern the proof required in case of false swearing, as an offense under military law. "Such offense will be, ordinarily, sufficiently established by the written record (or, in its absence, by secondary proof) of the testimony

[1] Bishop, New Cr. Law, Vol. 2, Sec. 1015. See Sec. 125, Act March 4, 1909, 35 St. L. 1111.
[2] Clark, Cr. Law, p. 330. See Sec. 126, Act March 4, 1909, 35 St. L. 1111.
[3] Dig. Op. J. A. G. 1986. [4] Id. 1985. [5] Id. 1982.

given, together with any reliable and satisfactory evidence that the same was knowingly false." [1]

In the 6th section the offense specifically mentioned is that of forging or counterfeiting, or procuring or advising others to forge or counterfeit, or to use, any signature, knowing the same to be forged or counterfeited, upon any writing or other paper, for the purpose of making a fraudulent claim against the United States.

Forgery, at common law, is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability.[2]

Counterfeiting is distinguished from forgery in that in the former there must be a resemblance to the signature counterfeited, while in forgery no such resemblance is requisite.

The thing forged or counterfeited under this Article is the "signature." As in forgery at common law, it should be proved that the falsified signature is upon a paper which is material, or appears upon its face to be material, to the proof of the claim, so as to be capable of use to effect, or contribute to effect, some fraud against the United States in connection with it. The fraud need not be consummated; the mere making of the false signature with the illegal purpose constitutes the crime.[3] The using, or procuring or advising the use of, such signature for the purposes stated in the Article is equally punishable with the forgery or counterfeiting thereof.

The 7th section provides a punishment for any person in the military service in charge, possession, custody, or control of any money or other property of the United States, who delivers, to any person having authority to receive the same, any less amount than that for which he

[1] Davis' Mil. Law p. 456.
[2] Bishop, New Cr Law, Vol. 2, Sec. 523.
[3] Winthrop, Vol. 1 p. 1009.

receives a certificate or receipt, or who knowingly delivers, or causes to be delivered, any paper certifying to the receipt of property, without having full knowledge of the truth of the statements therein, and with intent to defraud the United States.

The criminality of any person, under this clause, consists in the illegal withholding from any party of the difference between the amount of money or other property delivered, and the amount as shown on the face of the receipt, and the converting of the difference to his own use. The offense is committed whether the withholding is done in collusion with the other party or without his knowledge. This Article prohibits, by inference, the taking of blank receipts by Army officers for either money or property.

The payment, by officers charged with the disbursement of appropriations made by act of Congress, to any clerk or other employee of a less amount than the receipt or voucher calls for, and requiring such clerk or employee to receipt or give a voucher for an amount greater than that actually paid, makes them liable to punishment under provision made therefor.[1]

The 8th section provides a penalty for any person in the military service who, being authorized to make or deliver any paper certifying to the receipt of any property of the United States, makes or delivers such writing to any person without having a full knowledge of the truth of the statements contained therein, with intent to defraud the United States. This prevents any disclaimer as to knowledge of the contents of any such paper on the part of the party delivering or certifying it.

In the 9th section the offenses enumerated are punishable whenever they are committed in connection with the money or other property of the United States, furnished or intended for use in the military service thereof. This

[1] Sec. 86, Act March 4, 1909, 35 St. L. 1105.

section does not apply to other property, and therefore larceny of such other property can only be charged where it is prejudicial to good order and military discipline, under the 62d Article of War.

"Stealing" is a term which has nearly the same meaning as larceny, but does not always import a felony. The 58th Article of War gives courts-martial jurisdiction, "in time of war," over larceny, with other crimes; but this Article gives jurisdiction *at all times* over the larceny of "public property furnished or intended for military service."

The offense will also lie under the 62d Article of War, as it directly affects military discipline.[1]

"Embezzlement" is not a crime at common law, but is a statutory crime. It is the fraudulent appropriation or conversion to his own use of money or other property by a servant, clerk, trustee, public officer, or other person, acting in a fiduciary capacity, to whom the property has been intrusted by or for the owner.[2] It differs from larceny in that the property originally comes into the possession of the party lawfully, and the conversion to his own use is made while it is in his possession.

By statutory enactment of Congress certain acts and failures to act on the part of the disbursing officers and other officers and agents of the United States have been declared to constitute embezzlement.[3]

Among these are the following, affecting officers of the Army or military agents of any character, viz.: "Whoever, being a disbursing officer of the United States, or a person acting as such, shall in any manner convert to his own use, or loan with or without interest, or deposit in any place or in any manner, except as authorized by law, any public

[1] Winthrop, Vol. 1, p. 1011. [2] See Clark, Cr. Law, p. 270.
[3] See Sec. 3618-3652, Rev. Stat. U. S.; Sec. 85-95, Act March 4, 1909, 35 St. L. 1104-1106.

money intrusted to him; or shall, for any purpose not prescribed by law, withdraw from the Treasurer or any assistant treasurer, or any authorized depositary, or transfer, or apply, any portion of the public money intrusted to him, shall be deemed guilty of an embezzlement of the money so converted, loaned, deposited, withdrawn, transferred, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both."[1]

Every officer or other person charged by any act of Congress with the safe-keeping of the public moneys, who fails to safely keep the same, without loaning, using, converting to his own use, depositing in banks, or who exchanges for other funds except as specially allowed by law, any portion of the public moneys intrusted to him for safekeeping, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged,[2] as will also every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts, for the same as provided by law.[3] And every person who, having money of the United States in his possession or under his control, fails to deposit it with the Treasurer, or some assistant treasurer, or some public depositary of the United States, when required to do so by the Secretary of the Treasury, or the head of any other proper Department, or by the accounting officers of the Treasury is, also, deemed guilty of embezzlement thereof, and a penalty is provided therefor.[4]

"Whoever being an officer, clerk, agent, employee, or other person charged with the payment of any appropriation made by Congress shall pay to any clerk, or other

[1] Sec. 87, Act March 4, 1909, 35 St. L. 1105.
[2] Sec. 89 Id.
[3] Sec. 90 Id.
[4] Sec. 91 Id.

employee of the United States, a sum less than that provided by law, and require such employee to receipt or give a voucher for an amount greater than that actually paid to and received by him, is guilty of embezzlement."[1]

Provision is also made for the punishment of those persons who receive, conceal, or aid in concealing, or have, or retain in their possession with intent to convert to their own use or gain, any money, property, record, voucher, or valuable thing whatever, the property of the United States, which has been embezzled, stolen, or purloined.[2]

"To establish embezzlement in general it is necessary to show (1st) that the accused was a servant or agent of the owner of the property, or maintained some fiduciary relation toward him, (2d) that he received into his possession the money or other property of such owner, (3d) that he received it by virtue of his employment or fiduciary relation, and (4th) that he fraudulently converted it to his own use." [3]

An officer or soldier of the Army is always an agent or employee of the United States, and it will not in general be necessary to prove his commission or enlistment unless it be specially controverted. The fact that the accused was acting as such agent, in a fiduciary capacity, may be shown by general notoriety, his acts, admissions, etc.[4]

It is an act of "conversion to his own use," if any officer charged with the disbursement of the public moneys accepts, receives, or transmits to the Treasury Department to be allowed in his favor, any receipt or voucher from a creditor of the United States, without having paid to such creditor in such funds as the officer received for disbursement, or in such funds as he may be authorized

[1] Sec. 86, Act March 4, 1909, 35 St. L. 1105.
[2] See Act March 3, 1875, and Sec. 48, Act March 4, 1909, 35 St. L. 1098. [3] Winthrop, Vol. 1, p. 1012. [4] Id.

by law to take in exchange, the full amount specified in such receipt or voucher.[1]

The refusal of any person charged with the safe-keeping, transfer, or disbursement of the public money, to pay any draft, order, or warrant, drawn upon him by the proper accounting officer of the Treasury, for any public money in his hands belonging to the United States, or to transfer or disburse any such money promptly, upon the legal requirement of any authorized officer, shall be deemed, upon the trial of any indictment against said person for embezzlement, as *prima facie* evidence of such embezzlement;[2] and, by this rule, applied to a military case, where a formal demand made upon an officer or soldier in charge of public funds, by an authorized superior, to pay over or account for the same, is followed by his refusal or neglect within reasonable time to do so, this would be evidence *per se* of embezzlement.[3]

The misappropriation named in this section (9) of the Article may be either for his own use or for that of another, and includes the taking of the ownership, while the "applying to his own use or benefit" may be simply appropriation of the *use* of the article for purpose of himself or family.

In the 10th section of the Article the essential element of the offense is the fact of the party "knowingly" purchasing or receiving in pledge, for any obligation or indebtedness, goods which are the property of the United States, from any person not having a lawful right to sell or pledge the same.

The penalty for every person who receives stolen goods upon the high seas, or in any place under the exclusive jurisdiction of the United States, knowing the same to

[1] Sec. 95, Act March 4, 1909, 35 St. L. 1106.
[2] See Sec. 94 Id.
[3] Winthrop, Vol. 1, p. 1017.

have been taken or stolen, is punishment by a fine of not more than one thousand dollars, and by imprisonment at hard labor not more than three years;[1] and the penalty for knowingly purchasing, or receiving in pledge, from any soldier or sailor, officer, or other person employed in the military or naval service of the United States, of any arms, equipments, ammunition, clothes, military stores, or other public property, such person not having the lawful right to sell or pledge the same, is even more severe.[2]

The penalty on conviction of offenses under any of the sections of this Article is punishment "by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of such penalties."[3] Liability to prosecution continues even after dismissal or discharge, subject, however, to the statute of limitation.[4]

It is to be observed that there are two kinds of embezzlement under the United States statutes, one of which involves an act morally wrong in itself and done with evil *intent*, as the commission of fraud, forgery, false oath, etc.; the other being one which does not necessarily involve such an act or an evil intent, but which simply comes under the prohibition of the statute, such as the forbidding of the depositing of public money by a disbursing officer in any place or manner except as authorized by law, or the withdrawal by a disbursing officer of any portion of public money entrusted to him from an authorized legal depository for any purpose not prescribed by law, or the transfer or application of such funds except as so prescribed.[5]

The provisions of law, in addition to those of Article 60, regarding the care and disbursement of public funds

[1] Sec. 288, Act March 4, 1909, 35 St. L. 1145.
[2] See Sec. 32, 35, Act March 4, 1909, 35 St. L. 1095-6, and ante, Art. 17, par. 724.
[3] See Act March 2, 1901.
[4] See Art. 103; Dig. Op. J. A. G. 317.
[5] See Sec. 87, Act March 4, 1909, 35 St. L. 1105; Carter v. McClaughry, 183 U. S. 398.

should be carefully studied by every officer responsible therefor.[1]

**768. Art. 61. Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.**

The specific conduct which will render an officer liable to punishment under it is not stated in the Article; that is determined, according to the circumstances of each case, by the court-martial trying it, in accordance with the recognized customs and usages of the service and the general sentiment of the Army and community at large as to what is accepted as morally unbefitting and unworthy in a man of honor; that is to say a man of a high sense of justice, an elevated standard of morals and manners, and of corresponding deportment, which constitute the "gentleman"[2] which every officer of the Army is bound by the law to be.[3]

Acts which are merely inappropriate or unsuitable, as opposed to good taste or propriety or not consonant with usage, or the lack of a high standard of education or refinement and good breeding, will not affect the matter, which is confined to "conduct" alone.[4]

To constitute the offense under this Article, the conduct need not be "scandalous and infamous"; nor is it essential that the act should compromise the *honor* of the officer. In making the punishment of dismissal mandatory upon conviction, the Article evidently contemplates that "the conduct, while unfitting the party for the society of men of a scrupulous sense of decency and honor, shall

[1] See Rev. Stat. U. S., Sec. 250, 3617-3624, 3689, 3640, 3643-3648, 3651, 3652, 3678-3679 (amended, see G. O. 69, War Dept. 1906), 3681-3684, 3690-3692; Sec. 36, 86, 89-96, 98, 103, 117, Act March 4, 1909, 35 St. L. 1096, 1105-09.

[2] Winthrop, Vol. 1, p. 1022.

[3] 6 Op. Attorney-General, 417.

[4] Winthrop, Vol. 1, p. 1021.

exhibit him as unworthy to hold a commission in the Army." [1]

Knowingly making false official reports or certificates; preferring false charges or accusations against another officer; violation of pledge to abstain from intoxicating drink; appearing in a public place drunk, wearing his uniform, or visiting a disreputable place in uniform; gambling with enlisted men; indifference to pecuniary obligations so as to bring discredit and scandal upon the service; violently assaulting another without cause; giving false testimony as a witness before a court-martial, or attempting to suborn testimony; breach of trust; acts of fraud, cheats, etc.; abusing, assaulting, or beating his wife; duplication of pay accounts; commission of felony or crime; and other acts of like character, have been held chargeable under this Article.

"To justify a charge under this Article it is not necessary that the act or conduct of the officer should be immediately connected with or *directly* affect the military service. It is sufficient that it is morally wrong and of such nature that, while dishonoring or disgracing him as a gentleman, it compromises his character and position as an officer of the Army." [2]

An act in violation of a specific Article of War, which also constitutes conduct unbecoming an officer and a gentleman, may also be charged under Article 61.[3]

A sentence under this Article, which adds to dismissal any other penalty or penalties, is valid and operative only as to the dismissal; the rest should be disapproved as being unauthorized and of no effect.[4]

If evidence of the conduct charged under this Article fails to establish the specific offense, but is sufficient to

[1] Dig. Op. J. A. G. 123.
[2] Id. 132.
[3] Carter v. McClaughry, 183 U. S. 365, 366.
[4] Dig. Op. J. A. G. 142.

warrant conviction under the 62d Article, the finding may be "not guilty," but "guilty" of conduct to the prejudice of good order and military discipline in violation of the latter Article. But the reverse is not true.[1]

**769. Art. 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.[2]**

The evident purpose of this Article was to provide for the trial and punishment of any and all military offenses not expressly made cognizable by courts-martial in the other and more specific Articles, and thus to prevent the possibility of a failure of justice in the Army.[3] It is clear that a capital offense cannot be charged under this Article and, under its accepted construction, a crime specifically covered by any other Article should not be charged under the general Article. But if so charged it is not a question of jurisdiction but one of practice and a sentence imposed would not be void if approved by the proper reviewing officer.[4]

The word "crimes," as distinguished from neglects and disorders, means military offenses of a more serious nature, and includes such as are also civil crimes,—as homicide, arson, robbery, larceny, etc.

Any crime which is made capital by statute of the United States, or of the State or Territory in which committed, cannot be brought within the jurisdiction of a court-martial, under this Article, by charging it in a *lesser degree*,—as manslaughter, when the proof shows it was murder. In such case the court should refuse to take

[1] See ante, par. 297.
[2] See ante, par. 297, 298.
[3] Winthrop, Vol. 1, p. 1035.
[4] Carter v. McClaughry, 183 U. S. 397.

jurisdiction or to find or sentence; or, if it proceeds, the proceedings should be disapproved as unauthorized and void.[1]

Acts violating a specific Article of war, but which also constitute conduct to the prejudice of good order and military discipline, may be charged under this Article as well as, at the same time, under the specific Article, inasmuch as the provisions of each Article have been violated;[2] for example, embezzlement may be charged in violation of the 60th Article of War and the acts in connection therewith be charged under this Article.

The conduct must be directly prejudicial to good order and military discipline, and not remotely affecting either. Mere breaches of the peace committed by a soldier absent at a distance of more than ten miles from his station, in violation of a municipal ordinance, would not be cognizable.[3]

But drunkenness and disorderly conduct, within this limit of ten miles, causing the arrest of the offenders and their conviction by the civil authorities, is punishable under this Article.[4]

At a military post, or within military jurisdiction, or where the act or neglect in any way affects the good order and discipline of the Army, any and all kinds of such acts or neglects constitute offenses under this Article.[5]

A "neglect" is the failure to perform some obligation required in connection with military duty, and is chargeable when it prejudices good order or military discipline.

The term "disorder" as used in this connection is more comprehensive than when used in reference to civil affairs, and includes not only frays, quarrels, and the like, but all interruptions of the good order which should

[1] Dig. Op. J. A. G. 148.
[2] See Carter v. McClaughry, 183 U. S. 395, 396.
[3] Dig. Op. J. A. G. 160.
[4] See Executive Order establishing maximum limits of punishment, published June 12, 1905, amended by order of November 25, 1908; G. O. 204, War Dept. 1908, Appendix D.
[5] See Dig. Op. J. A. G. 159.

prevail in camp or garrison and wilful departures from that orderly recurrence of events which constitutes military discipline, and which are, as such, harmful or prejudicial to good order and military discipline.[1]

**770. Art. 63. All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.**

"Retainers to the camp" include all who are attached to the camp in any capacity, either temporarily or permanently, through which they receive fee, stipend, or pay, such as clerks, drivers, guides, and others maintained at public expense and employed on the public service.[2]

The term "camp-followers" includes all persons "who, though neither enlisted men nor in pay, have at all times been subject to orders according to the rules and discipline of war, whether temporarily or permanently attached to, or momentarily and accidentally connected with, the army in the field, or on the line of march." [3]

The words "persons serving with the armies . . . in the field" include both those who are attached to the camp, receiving pay or maintained at public expense, and those who are serving in any private capacity, as officers' servants, and the like.

This latter class, though subject to trial by court-martial for breaches of discipline committed by them, have seldom been tried, but have usually been punished by dismissal from employment and expulsion from the limits of the camp.[4] But those employed and receiving pay, or maintained at public expense, have repeatedly been tried and punished by court-martial, in time of war, when with the armies in the field.[5] Such trial has been held justifiable when the person was serving with the troops in the

[1] Davis' Mil. Law, p. 474. [2] Samuel, p. 694. [3] Simmons, Sec. 71.
[4] Dig. Op. J. A. G. 161. [5] Id. 162.

field in active warfare with hostile Indian tribes.[1] But the jurisdiction authorized does not extend to "time of peace"; civilians cannot legally be subjected to military jurisdiction by the authority of this Article *after* the war has terminated. The jurisdiction, to be lawfully exercised, must be exercised during the *status belli*.[2]

**771. Art. 64. The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall, at all times and in all places, be governed by the Articles of War, and shall be subject to be tried by courts-martial.**[3]

Military offenses are not territorial, and when an officer or soldier commits an offense, though in a foreign territory, he is amenable to trial by, and may be brought before, a court-martial wherever it may be convened for the purpose.[4]

### ARRESTS AND CONFINEMENT [5]

**772. Art. 65. Officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer. And any officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed from the service.**[6]

**773. Art. 66. Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority.**[7]

**774. Art. 67. No provost-marshal, or officer commanding a guard, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime charged against the prisoner.**[8]

"It is the duty of the receiving officer to satisfy himself that the prisoner tendered is one subject to military law. Beyond this he has no responsibility, the duty and

[1] Dig. Op. J. A. G. 164.
[2] Id. 166.
[3] See ante, par. 3, 53.
[4] Dig. Op. J. A. G. 169.
[5] See ante, Chap. VIII.
[6] See ante, Chap. VIII, par. 92.
[7] See ante, Chap. VIII, par. 104–106.
[8] See ante, Chap. VIII, par. 105, 106.

responsibility of receiving and keeping the prisoner arising, *eo instante*, as soon as he is presented. His obligation is the same whether the offense charged be civil or military." [1]

**775. Art. 68. Every officer to whose charge a prisoner is committed shall, within twenty-four hours after such commitment, or as soon as he is relieved from his guard, report in writing, to the commanding officer, the name of such prisoner, the crime charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.**[2]

**776. Art. 69. Any officer who presumes, without proper authority, to release any prisoner committed to his charge, or suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.**

The prisoner having been received in accordance with the provisions of Article 67, and reported according to Article 68, whatever officer succeeds to the charge of such prisoner is equally responsible for his safe-keeping, that he does not escape; and he cannot release him without proper authority, which he must be able to produce or prove when called upon to account for the prisoner.

In case of a sentinel allowing a prisoner to escape he is chargeable under the 62d Article of War for "wilfully suffering him to escape," or "allowing him to escape through neglect." [3]

**777. Art. 70. No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.**[4]

The closing sentence of the Article permits of a discretionary power on the part of the authority whose duty it is to convene the court for the trial of the case. This may leave it open to injustice on his part by unnecessary delay. But in case of such arbitrary or unjust action the

[1] Davis' Mil. Law, p. 486.
[2] See ante, Chap. VIII, par. 105.
[3] See Executive Order establishing limits of punishment, published June 12, 1905, amended by order dated November 25, 1908; G. O. 204, War Dept. 1908, Appendix D.
[4] See ante, par. 106.

person suffering has a remedy in the power to prefer charges against him therefor, which will, upon conviction, subject the oppressor to severe punishment for his oppression, or he may bring a civil suit for the injury sustained. "Whether the delay in any case is to be regarded as so far unreasonable as properly to subject the commander responsible therefor to military charges or a civil action, must depend upon the circumstances of the situation and the exigencies of the service at the time." [1]

When a soldier has been in arrest for a long period of time before trial, or while awaiting promulgation of his sentence, this fact is usually taken into consideration in awarding sentence, or in mitigation thereof.

**778. Art. 71. When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest.**

The term "within ten days thereafter" is held to mean "after his arrest." [2] It has been held a sufficient compliance with the requirement as to the service of charges, to have served a true copy of the existing charges and specifications, though the list of witnesses appended to the original charges was omitted, and though the charges themselves were not in sufficient legal form and were intended to be amended and redrawn.[3]

[1] Dig. Op. J. A. G. 177.
[2] Id. 179.
[3] Id. 180.

The fact that officers are stationed at remote posts or stations does not authorize an abuse of power in these cases, and where, in such case, an arrest has been unreasonably protracted without trial, an officer has been held to be entitled to be released from arrest upon a proper application submitted for the purpose.[1]

But an officer, though entitled to release from arrest under this Article, is not authorized to release himself therefrom. If not released under such circumstances he should apply for his discharge from arrest, through the proper channels, to the authority by whose order the arrest was imposed or other proper superior.[2]

COURTS-MARTIAL

**779. Art. 72. Any general officer commanding an army, a Territorial Division or a Department, or colonel commanding a separate Department, may appoint general courts-martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case.[3]**

Whether the commander who convened the court is an "accuser" or "prosecutor" in the sense of the Article, or not, must be determined from his *animus* in the matter. If he initiates an investigation of an officer's conduct and formally prefers, as his individual act, charges against him; or, by reason of personal interest adverse to him, practically adopts as his own charges initiated by another, he is clearly the accuser or prosecutor within the Article. But, on the other hand, it is his duty to determine, where the facts are brought to his knowledge, whether an officer in his command, charged with a military offense, shall be brought to trial, or not. To this end he may formally refer, or revise, or cause to be revised and then

[1] Dig. Op. J. A. G. 181. [2] Id. 178. [3] See ante, par. 34–40.

formally referred, charges preferred against such officer by another, or he may direct a suitable officer to investigate the matter, and to formulate and prefer such charges as the facts may warrant and, having been submitted to him, he may revise and refer them for trial as in other cases. This he does in the proper performance of his official duty without becoming the accuser or prosecutor in the case. Nor is he the accuser or prosecutor where he causes charges to be preferred and proceeds to convene the court by direction of the Secretary of War or a competent military superior.[1]

**780. Art. 73. In time of war the commander of a division, or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander.[2]**

**781. Art. 74. Officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same.**

Whenever a court-martial shall sit in closed session the judge-advocate shall withdraw, and when his legal advice or his assistance is required it shall be obtained in open court.[3]

**782. Art. 75. General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service.[4]**

**783. Art. 76. When the requisite number of officers to form a general court-martial is not present in any post or detachment, the commanding officer shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall, thereupon, order a court to be assembled at the nearest post or department at which there may be such a requisite number of officers, and shall order the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled.**

[1] Dig. Op. J. A. G. 187.
[2] See ante, par. 41–43.
[3] A. R. 956; Act July 27, 1892; ante, par. 152.
[4] See ante, par. 46, 47, 132–145.

This provision is necessary when the number of officers eligible to sit upon a case at a post where trial is to be had is insufficient to constitute a court.

**784. Art. 77. Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Article 78.**[1]

**785. Art. 78. Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present and duly authorized, shall be obeyed.**[2]

**786. Art. 79. Officers shall be tried only by general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank.**[3]

787. Art. 80. Repealed by Act of June 18, 1898.

**788. Art. 81. Every officer commanding a regiment or corps shall, subject to the provisions of Article 80, be competent to appoint, for his own regiment or corps, courts-martial, consisting of three officers, to try offenses not capital.**[4]

Article 80 having been repealed by the act establishing the summary court (Act June 18, 1898), and the field officer's court having been abolished, the commanding officer of a regiment or corps is no longer restricted, by the provisions of that Article, from appointing regimental courts, in time of war, even when a field officer is present.

**789. Art. 82. Every officer commanding a garrison, fort, or other place, where the troops consist of different corps, shall, subject to the provisions of Article 80, be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offenses not capital.**[5]

The clause "subject to the provisions of Article 80"

[1] See ante, par. 50, 51.
[2] See ante, par. 50.
[3] See ante, par. 49, 140.
[4] See ante, par. 77, 78, and post, Art. 83, par. 790.
[5] See ante, par. 74–78; post, Art. 83, par. 790.

has been superseded by the new law establishing the summary court.[1]

**790. Art. 83. Regimental and garrison courts-martial and summary courts detailed under existing laws to try enlisted men shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto, in the case of non-commissioned officers, reduction to the ranks, and in the case of first-class privates reduction to second-class privates: Provided, That a summary court shall not adjudge confinement and forfeiture in excess of a period of one month, unless the accused shall before trial consent in writing to trial by said court, but in any case of refusal to so consent, the trial may be had either by general, regimental, or garrison court-martial, or by said summary court, but in case of trial by said summary court without consent as aforesaid, the court shall not adjudge confinement or forfeiture of pay for more than one month.[2]**

Capital offenses not being within the jurisdiction of inferior courts, such courts cannot take cognizance of acts made specifically punishable by Article 21, however slight may be the offenses actually committed.[3]

This Article fixes the limit of the punishing power of inferior courts; and for those offenses for which a limit of punishment has been prescribed, a summary court is restricted to the *kinds* of punishment named, except as to the substitutions, as authorized in the Executive Order, establishing those limits.[4]

While inferior courts have, equally with general courts, jurisdiction of all military offenses not capital committed by enlisted men, the more serious offenses should, where practicable, be referred for trial to general courts-martial, which are alone vested with a full discretion to impose punishment in proportion to the gravity of the offense.

[1] Act June 18, 1898.
[2] As amended by Act of March 2, 1901; see ante. par 81.
[3] Dig. Op. J. A. G. 219.
[4] See Executive Order published June 12, 1905, as amended by order of November 25, 1908; G. O. 204, War Dept. 1908, Appendix D.

"An inferior court cannot, however, legally decline to try or sentence an offender on the ground that it is not empowered by this Article to impose a punishment adequate to his actual offense." [1]

The summary court is a court-martial within the meaning of the acts making appropriations for "expenses of courts-martial . . . and compensation of witnesses attending the same." The summary court officer will make the necessary certificate as to the fact of attendance in the case of a civilian witness and administer the oath respecting his account.[2]

**791. Art. 84. The judge-advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial: "You, A. B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority, except to the judge-advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law. So help you God." [3]**

The administration of this oath to every member is essential to the validity of the proceedings, and the fact that it has been so administered must appear upon the record.[4] In swearing the members the judge-advocate addresses each member by name, beginning with the

[1] Dig. Op. J A. G. 224.
[2] Id. 2406.
[3] See ante, par. 174, 390; Act July 27, 1892.
[4] See ante, par. 174, 390.

senior in rank, saying: "You, A. B., C. D., etc., do swear," etc.[1]

While the oath specifically requires that they will not divulge the sentence of the court, and is silent as to its finding, it is accepted as a custom of the service that the finding also is not to be divulged. Disclosures made before the final action of the reviewing officer would not be conducive to the best interests of the service, and might even be erroneous at the conclusion of the case, because of a reconsideration required by that officer. But disclosures made would not affect the validity of the proceedings or sentence; they would, however, lay the person open to charge of violation of the oath of secrecy taken.

A member added to the court, after the other members have been sworn, should be separately sworn in the full form prescribed by the Article. A member who prefers it may be affirmed instead of sworn.[2]

As the court must be sworn in each particular case it tries, the introduction of additional charges, after the court has been sworn on those already before it, would be improper and illegal, and the proceedings fatally defective, the court not having been sworn for their trial.[3]

The words "a court of justice" "are deemed to mean a civil or criminal court of the United States, or of a State, and not to include a court-martial." [4]

**792. Art. 85. When the oath has been administered to the members of a court-martial, the president of the court shall administer to the judge-advocate, or person officiating as such, an oath in the following form: "You, A B., do swear that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor**

[1] See ante, par. 174.
[2] Dig. Op. J. A. G. 225.
[3] Id. 226.
[4] Davis' Mil. Law, p. 506.

**divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same. So help you God."** [1]

The purpose of the oath is similar to that prescribed for the members, but permits the judge-advocate to divulge the sentence to the proper authority, who is, of course, the officer who, by law, is the proper reviewing authority

**793. Art. 86. A court-martial may punish, at discretion, any person who uses any menacing words, signs, or gestures, in its presence, or who disturbs its proceedings by any riot or disorder.**[2]

**794. Art. 87. All members of a court-martial are to behave with decency and calmness.**[3]

While the members of the court-martial are not punishable for contempt, they are subject to charges, and trial by court-martial, for any violation of this Article; and if the misbehavior justifies it, the charge may also be laid under the 61st Article of War.

**795. Art. 88. Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.**[4]

The right of challenge being statutory, it is essential to the validity of the proceedings that opportunity be offered the accused to challenge each member, and this must appear from the record.

**796. Art. 89. When a prisoner, arraigned before a general court-martial, from obstinacy and deliberate design, stands mute, or answers foreign to the purpose, the court may proceed to trial and judgment, as if the prisoner had pleaded not guilty.**[5]

**797. Art. 90. The judge-advocate, or some person deputed by him, or by the general or officer commanding the Army, detachment, or garrison, shall prosecute in the name of the United States, but when the prisoner has made his plea, he shall so far**

[1] See ante, par. 174.
[2] See ante, par. 68–73.
[3] See ante, par. 69, 143, 144.
[4] See ante, par. 166–173.
[5] See ante, par. 209.

**consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner, the answer to which might tend to criminate himself.**[1]

The provision of this Article, "or some person deputed by him" (the judge-advocate), was adopted from the similar provision in the early British articles; but, though retained here, is now obsolete, being superseded, in modern practice, by the provision of Article 74. A judge-advocate cannot now depute any person to prosecute an accused before a court-martial.

**798. Art. 91. The depositions of witnesses residing beyond the limits of the State, Territory, or District in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital.**[2]

"A deposition cannot be read in evidence in a capital case (that is, in a case where the offense charged is punishable capitally), as in a case of violation of Article 21, or in case of a spy, or one of desertion in time of war," or a sentinel sleeping on post, etc., in violation of Article 39. But it may be read in case of a trial for desertion in time of peace.[3]

The party at whose instance a deposition has been taken must offer the deposition in evidence as a whole or not offer it at all; he cannot select such parts only as are favorable to him. If he decides not to put it in at all, it may be read in evidence by the other party. One party, where the deposition has been duly taken, and is admissible under this Article, cannot withhold it without the consent of the other party.[4]

The provisions of Sections 866–870, Revised Statutes, relate to depositions in the United States courts and have no application to courts-martial.[5]

[1] See ante, par. 148–157.
[2] See ante, par. 251–259.
[3] Dig. Op. J. A. G. 256.
[4] Id. 258, 259.
[5] Id. 273.

"Questions as to the competency or credibility of the deponent are determined by the court, and the deposition of an incompetent deponent, though formal and properly obtained and not subject to exception in respect to validity of execution, is not admissible in evidence at a trial by court-martial." [1]

**799. Art. 92. All persons who give evidence before a court-martial shall be examined on oath, or affirmation, in the following form: "You swear (or affirm) that the evidence you shall give, in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God." [2]**

The Article does not prescribe by whom the oath shall be administered. By the custom of the service it is administered by the judge-advocate. When the judge-advocate himself takes the witness-stand, he is properly sworn by the president of the court.[3] Judge-advocates of courts-martial are now authorized by law to administer oaths for all purposes of administration of military justice.[4]

A witness who has once been sworn in a case is not required to be again sworn when recalled to testify in the same case. He should, however, be cautioned that he has already been duly sworn in the case, and that he is still under oath. If re-sworn, however, it will not affect the validity of the proceedings or sentence.[5]

**800. Art. 93. A court-martial shall, for reasonable cause, grant a continuance to either party, for such time, and as often, as may appear to be just: Provided, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.[6]**

The court decides what is a "reasonable cause" within the meaning of the Article, and having found that it exists,

[1] Davis' Mil. Law, p. 515.
[2] See ante, par. 238–240, and 615.
[3] Dig. Op. J. A. G. 274.
[4] Act July 27, 1892.
[5] Dig. Op. J. A. G. 274, note; Davis' Mil. Law, p. 517.
[6] See ante, par. 176.

is then bound to grant a continuance. A refusal to do so, however, will not invalidate the proceedings; but if the accused has been prejudiced in his defense it may constitute a ground for disapproval of the proceedings, or mitigation of any sentence awarded.[1]

Good grounds for continuance have been held to be (1st) absence of a material witness, (2d) time to procure the deposition of a distant witness, (3d) absence of written or documentary evidence, (4th) sickness of the accused, the judge-advocate, or a material witness, (5th) time to procure the assistance of counsel, (6th) time to prepare the defense, and the like.[2]

**801. Art. 94.** This Article, which fixed the hours when the court might sit, *has been repealed.*[3]

**802. Art. 95. Members of a court-martial, in giving their votes, shall begin with the youngest in commission.**[4]

**803. Art. 96. No person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned.**[5]

**804. Art. 97. No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment.**[6]

This provision for punishment by imprisonment in a penitentiary for offenses which are so punishable under the laws of the United States, or the laws of the State, Territory, or District where the offense is committed, excepts, by its limitation, other cases arising in the mili-

[1] Dig. Op. J. A. G. 276.
[2] See Winthrop, Vol. 1, p. 333 et seq.; Dig. Op. J. A. G. 277–280; see ante, par. 176.
[3] Act March 2, 1901; see Appendix C.
[4] See ante, Chap. XXII, par. 370–377.
[5] See ante, par. 312, 328–331, 370–377.
[6] See ante, par. 313–316, 344, 345.

tary service, so that offenses purely military in character, sueh as desertion, disobedience of orders, neglect of duty, and the like, not being felonies under the laws of the United States, or the State, etc., cannot be punished by imprisonment in a penitentiary; but they may be punished by confinement in a military prison, or at a post. And in such cases a sentence to be confined in a penitentiary is wholly unauthorized and illegal and should be disapproved. "Effect cannot be given to such a sentence by *commuting* it to confinement in a military prison, or to some other punishment that would be legal for such offense. Nor, in case of *such* an offense, can a severe penalty, as death, be commuted to confinement in a penitentiary." [1] But where a sentence to a penitentiary is legal it may be mitigated to confinement in a military prison, or at a military post.[2]

**805. Art. 98. No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.[3]**

Punishments such as branding convicted deserters with the letter D, etc., were formerly awarded, but are now prohibited as contrary to public policy and to the best interests of the service.

**806. Art. 99. No officer shall be discharged or dismissed from the service, except by order of the President, or by sentence of a general court-martial; and in time of peace no officer shall be dismissed, except in pursuance of the sentence of a court-martial, or in mitigation thereof.[4]**

The dismissal of an officer from the service, in time of peace, is limited by this Article to dismissal "in pursuance of the sentence of a court-martial, or in mitigation thereof." In time of war an officer may be discharged

[1] Davis' Mil. Law, p. 522.
[2] Dig. Op. J. A. G. 299.
[3] See ante, par. 368, 369.
[4] See ante, par. 66, 332–335.

or dismissed from the service by sentence of a general court-martial or, summarily, by order of the President.

A summary dismissal of an officer by the Executive does not take effect until the order of dismissal, or an official copy of the same, is delivered to him, or he is otherwise officially notified of the fact of his dismissal. Such order does not deprive the officer of his right to any pay due him at the time.

**807. Art. 100. When an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp, and in the State from which the offender came, or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.**

"The terms 'cowardice' and 'fraud' employed in this Article may be considered as referring mainly to offenses made punishable by Articles 42 and 60. With these, however, may be regarded as included all offenses in which fraud or cowardice is *necessarily involved*, though the same be not expressed in terms in the charge or specification." [1]

"Though the injunction of the Article as to the *direction* to be added in the sentence should, of course, be regularly complied with, a failure to so comply will not affect the validity of the punishment of dismissal adjudged by the sentence." [2]

The declaration that "it shall be scandalous," etc., is not intended to be, and should not be, incorporated in the sentence. [3]

**808. Art. 101. When a court-martial suspends an officer from command, it may also suspend his pay and emoluments for the same time, according to the nature of his offense.**[4]

[1] Dig. Op. J. A. G. 301.
[2] Id. 302.
[3] Id., note.
[4] See ante, par. 337–340.

Notwithstanding the suspension of an officer from rank and command, he is entitled to quarters according to rank if present at the post.[1]

**809. Art. 102. No person shall be tried a second time for the same offense.[2]**

In order to avail himself of the plea under this Article it must be shown that the proceedings in the former trial were before a legally organized court-martial having jurisdiction of the case; the proceedings must have been without fatal defect, and the finding valid.[3] The offense charged must be the same as in the former trial, that is, the two offenses must be identical or be so related, from the fact that one is included in the other, that the trial and an acquittal or conviction of the one necessarily puts the accused in jeopardy of the other.[4]

The provisions of the Article apply to inferior courts as well as to general courts-martial.[5]

The reconsideration by a court-martial of a finding, whether of guilty or not guilty, when duly reconvened for that purpose, is not a second trial within the meaning of this Article. The original and revised proceedings are merely parts of one and the same trial.[6]

**810. Art. 103. No person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period.**

**No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence**

[1] Cir. 1, H. Q. A., A. G. O., 1892; A. R. 1042.
[2] See ante, par. 194–200.
[3] Winthrop, Vol. 1, pp. 364–367.
[4] Id., p. 368.
[5] Id., p. 691.
[6] Dig. Op. J. A. G. 313.

**shall be excluded in computing the period of the limitation: Provided, That said limitation shall not begin until the end of the term for which said person was mustered into the service.**[1]

"In view of this Article it is the duty of the government to prosecute an offender within a reasonable time after the commission of the offense." [2]

The fact that the offense was concealed by the accused and remained unknown to the military authorities for more than two years, constitutes no "impediment" in the sense of this Article.[3]

The liability to trial after discharge, imposed by the last clause of Article 60, is subject to the statute of limitation,[4] and so also is the liability to trial after expiration of the term of enlistment under Article 48,[5] and so as to Article 71.[6]

**811. Art. 104. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being.**[7]

This Article is properly to be complied with by an approval of the sentence (where the same is approved in fact) by the "officer ordering the court," etc., although —as in case of sentence of dismissal of an officer in time of peace—he may not be empowered *finally* to confirm and give effect to the sentence. His approval is required as showing that he does not, as he is authorized to do, *disapprove*.[8]

**812. Art. 105. No sentence of a court-martial, inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted in time of war, as spies, mutineers, deserters,**

[1] As amended by Act of April 11, 1890; see ante, par. 186–193.
[2] Dig. Op. J. A. G. 319.
[3] Id. 315.
[4] Art. 103.
[5] Dig. Op. J. A. G. 317.
[6] Winthrop, Vol. 1, p. 361.
[7] See ante, par. 428–434.
[8] Dig. Op. J. A. G. 323.

**or murderers, and in the cases of guerrilla marauders, convicted, in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon confirmation by the commanding general in the field, or the commander of the department, as the case may be.**[1]

This Article confers upon the commanding general in the field, or the commander of the department, as the case may be, power to carry into execution, in time of war, sentences of courts-martial inflicting the punishment of death for offenses mentioned therein, instead of awaiting the action of the President, which is required "in time of peace." But the corresponding power to remit or mitigate the sentence is not expressly given in the Article.

The power here given has been extended to embrace the sentences of military commissions in the cases mentioned, and is essential to the maintenance of good order and discipline within the theatre of active military operations. If occasion for clemency arises, or for pardon, the matter is left, as vested by the Constitution, in the hands of the Executive.[2]

**813. Art. 106. In time of peace no sentence of a court-martial, directing the dismissal of an officer, shall be carried into execution, until it shall have been confirmed by the President.**[3]

Under this Article the sentence of dismissal of an officer must, in time of peace, be confirmed by the President before it can be carried into execution.

The legal sentence of dismissal of an officer takes effect on the date of personal official notice of the order separating him from the military service; and he is entitled to pay and allowances up to that date. The date which the order bears is immaterial if notice of the same is not duly brought home to the officer till a subsequent day.[4]

[1] See ante, par. 437–440.
[2] See Act July 2, 1864 (13 Stat. L. 356); Davis' Mil. Law, pp. 543–44,
[3] See ante, par. 438.
[4] Dig. Op. J. A. G. 1849.

But where an officer fails to receive personal official notice by reason of some fault or neglect of his own he will not be permitted to take advantage of his own wrong, and the receipt of the order at his proper station, or last reported station, will be held to operate as due and effectual, or constructive, notice.[1]

The sentence of dismissal does not attach any legal disability to the person dismissed. He may be re-appointed,[2] or may enlist, or hold civil office under the United States,[3] except where specifically disqualified therefrom by law.[4]

**814. Art. 107. No sentence of a court-martial appointed by the commander of a division or of a separate brigade of troops, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the general commanding the army in the field to which the division or brigade belongs.[5]**

In order to give effect to the sentence and life to the proceedings the action of approval of the commander of the division or separate brigade is necessary; where that officer disapproves the proceedings and sentence they become null and void, and there is nothing left for the general commanding the Army in the field to act upon.

In view of the provisions of Article 106, taken in connection with this Article, it is held that when, *in time of war*, a department commander is the reviewing authority, no confirmation of a sentence of dismissal by higher authority is necessary; but when a division or separate brigade commander is the reviewing authority, such sentence must be confirmed by the general commanding the Army in the field to which the division or brigade belongs. And, in the latter case, if the division or brigade does not belong to a separate army in the field the commanding

[1] Dig. Op. J. A. G. 1848.
[2] See Sec. 1228, Rev. Stat.
[3] Dig. Op. J. A. G. 1201.
[4] See ante, Art. 14, par. 721.
[5] See ante, par. 441.

general of the Army of the United States would be the proper confirming authority, within the meaning of this Article.[1] Exception, however, must be made as to the dismissal of a general officer, which is governed by the provisions of Article 108.

**815. Art. 108. No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer, shall be carried into execution, until it shall have been confirmed by the President.[2]**

Every sentence respecting a general officer, no matter what its character, whether severe or mild, must remain unexecuted until confirmed by the President, who thus comes to a knowledge of, and passes upon, every dereliction of duty of these officers of high rank, of which they may have been convicted.

**816. Art. 109. All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court, or by the officer commanding for the time being, where confirmation by the President, or by the commanding general in the field, or commander of the department, is not required by these articles.[3]**

In all but the cases herein excepted the action of the officer ordering the court, or the officer commanding for the time being, is final.

Where the sentence may be lawfully carried into execution, on the confirmation of the officer ordering the court, neither the President nor Secretary of War has lawful authority to approve or disapprove the same.[4]

When the sentence of a court-martial, lawfully confirmed, has been executed, the proceedings are no longer subject to review by the President.[5]

**817. Art. 110.** Relating to field officers' courts, was *repealed by Act of June 18, 1898.*

[1] Dig. Op. J. A. G. 338.
[2] See ante, par. 439.
[3] See ante, par. 428–434, 436, and Art. 104, par. 811.
[4] 11 Op. Attorney-General 251.
[5] 15 Id. 291.

**818. Art. 111. Any officer who has authority to carry into execution the sentence of death, or of dismissal of an officer, may suspend the same until the pleasure of the President shall be known; and, in such case, he shall immediately transmit to the President a copy of the order of suspension, together with a copy of the proceedings of the court.**[1]

It is to be noted that although the wording of the Article indicates that *copies* only of the proceedings of the court and of the order of suspension are required to be forwarded to the President, yet, in actual practice, the *original* proceedings, with the action of the reviewing officer thereon, are forwarded. The effect of the suspension is to place in the hands of the President the opportunity to approve, disapprove, or modify the suspended sentence.

**819. Art. 112. Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held, shall have power to pardon or mitigate any punishment which such court may adjudge.**[2]

The military commander vested with the power of mitigation or pardon under this Article cannot delegate the power to an inferior.[3]

The grounds for pardon or mitigation depend upon the circumstances of each case and may be any that the commander believes will justify such action. It is not necessary, however, that he should publish the reasons for his action.

**820. Art. 113. Every judge-advocate, or person acting as such, at any general court-martial, shall, with as much expedition as the opportunity of time and distance of place may admit, forward the original proceedings and sentence of such court to the Judge-Advocate-General of the Army, in whose office they shall be carefully preserved.**[4]

[1] See ante, par. 445.
[2] See Chap. XXV, par. 446–455.
[3] Dig. Op. J. A. G. 341.
[4] See ante, par. 422.

This Article directs the final disposition of the records of general courts-martial, and not, as might appear on its face, a forwarding of the papers direct to the Judge-Advocate-General; for the proceedings of the court are incomplete and without effect until acted upon by the proper reviewing authority. The judge-advocate, therefore, forwards the proceedings direct to that authority, and the final reviewing authority, after the proceedings are completed by his action, forwards them to the Judge-Advocate-General, as the Article requires.

**821. Art. 114. Every party tried by a general court-martial shall, upon demand thereof, made by himself or by any person in his behalf, be entitled to a copy of the proceedings and sentence of such court.**[1]

The party tried is the person entitled to the copy of the proceedings and sentence, and it will be furnished only when asked for by him or by some person "in his behalf." In the latter case the person applying should exhibit satisfactory evidence that he duly represents the accused as his agent, attorney, or otherwise.[2]

Persons desiring a copy, or any part thereof, of the record of a court-martial, who are not entitled to it under the above Article, may apply therefor to the Secretary of War, stating the reason for the application, and, if it is approved by the Secretary, it will be referred to the Judge-Advocate-General, who will have the copy prepared and transmitted.[3]

### COURTS OF INQUIRY

**822. Art. 115. A court of inquiry, to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier, may be ordered by the President or by any commanding officer; but, as courts of inquiry may be perverted to dishonorable purposes, and may be employed, in the hands of weak and envious commandants, as engines for the destruction of military merit, they shall never be ordered by any command-**

[1] See ante, par. 423, 424. [2] Dig. Op. J. A. G. 360. [3] Id. 361.

**ing officer, except upon a demand by the officer or soldier whose conduct is to be inquired of.**[1]

**823. Art. 116. A court of inquiry shall consist of one or more officers, not exceeding three, and a recorder, to reduce the proceedings and evidence to writing.**[2]

**824. Art. 117. The recorder of a court of inquiry shall administer to the members the following oath: "You shall well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."** [3]

**825. Art. 118. A court of inquiry, and the recorder thereof, shall have the same power to summon and examine witnesses as is given to courts-martial and the judge-advocates thereof. Such witnesses shall take the same oath which is taken by witnesses before courts-martial, and the party accused shall be permitted to examine and cross-examine them, so as fully to investigate the circumstances in question.**[4]

**826. Art. 119. A court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so.**[5]

The court of inquiry is sometimes instituted for the purpose of aiding the President, or commanding officer upon the demand of an officer or soldier, to determine whether further proceedings in the case should be had before a court-martial, and when this is the case the opinion of the court should state whether such further proceedings are called for or not. Where the object for which the court is convened is to investigate a question of military right, responsibility, or conduct, etc., the opinion will properly be confined to the special question proposed and its legitimate military relations. A court of inquiry will rarely

[1] See ante, Chap. XXVI, par. 459–477.
[2] See ante, Chap. XXVI, par. 461–463.
[3] See ante, Chap. XXVI, par. 460–467.
[4] See ante, Chap. XXVI, par. 469–471.
[5] See ante, Chap. XXVI, par. 474, 475.

find itself called upon to express an opinion upon questions of a purely legal character.[1]

**827. Art. 120. The proceedings of a court of inquiry must be authenticated by the signatures of the recorder and the president thereof, and delivered to the commanding officer.[2]**

The "commanding officer" to whom the proceedings are to be delivered is the President, or the commanding officer, depending upon which authority convened the court.

**828. Art. 121. The proceedings of a court of inquiry may be admitted as evidence by a court-martial, in cases not capital nor extending to the dismissal of an officer: Provided, That the circumstances are such that oral testimony cannot be obtained.[3]**

While the proceedings of a court of inquiry cannot be admitted as evidence on the *merits of the case*, upon a trial before a court-martial of an offense for which sentence of dismissal will be mandatory upon conviction, yet upon the trial of such an offense, as upon any other, such proceedings, properly authenticated, would be admissible in evidence for the purpose of impeaching the statements of a witness upon the trial who, it was proposed to show, had made quite different statements upon a hearing before a court of inquiry.[4]

COMMAND

**829. Art. 122. If, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President, according to the nature of the case.[5]**

The purpose of this Article is to prevent question as to right of command when "different corps of the Army"—

[1] Dig. Op. J. A. G, 371. [2] See ante, par. 474. [3] See ante, par. 478.
[4] Dig. Op. J. A. G. 372.
[5] This article does not operate to give officers of the Marine Corps, which is *not* a part of the Army, the right to exercise command unless they have been detached for service with the Army by order of the President. (Cir. 66, War Dept. 1909.)

which is here used in a general sense to mean all arms and separate and distinct branches of the military establishment—meet together, by designating the officer highest in rank, in the line of the forces then present, as the commander of the whole; except where the President otherwise specially assigns one to command.

The words "corps of the Army" include not only the infantry, cavalry, and artillery, but the various departments, or individual officers, included under the general term *staff*, and in this Article the word "corps" is interpreted to mean "not only an organized body or a complete portion of a force, but any officered detachment however small, or a single officer, representing such an organization or portion." [1]

The Article is intended to comprehend not only cases where different corps are employed together on some specific duty under express orders, but where, by chances of an engagement, a march, or other incident of the service, such corps meet and combine in any military movement or in the occupation of the same camp, garrison, or post. A mere fortuitous and temporary meeting, where the two or more bodies or detachments do not in fact combine, and where no occasion arises for the assumption of a single command over the whole, is not contemplated.[2] Where, also, the junior officer is acting under specific orders from a common superior, no order, except in a justifiable emergency, should be given him that will interfere with the execution of his orders from that superior.

VOLUNTEERS

**830. Art. 123. In all matters pertaining to the rank, duties, and rights of officers, the same rules and regulations shall apply to officers of the Regular Army and to volunteers commissioned in, or mustered into said service, under the laws of the United States, for a limited period.[3]**

[1] Winthrop, Vol. 1, p. 1082. [2] Id. [3] See ante, par. 51, 53, 134.

This Article recognizes the fact that in any large war a great part of our armies necessarily consists of volunteers, and, having been mustered into the United States service, they are hereby placed upon the same status as to rank, duties, etc., as officers of the permanent establishment.

**Volunteers.** — The term "volunteers" is applied to soldiers of an army raised, organized, supported, and maintained for a limited period by the United States, independently of any State.[1] These forces usually come into service upon a call of the President pursuant to express authority to make such call given him by Congress.

When accepted and mustered into service, they become a part of the Army of the United States, and, though they become subject to the Articles of War, the laws, regulations, and orders governing the Regular Army, yet they are a distinct force, and it has been held by the courts that the words "other forces" as used in the 77th Article of War include the Volunteer forces and that officers of the Regular Army are incompetent under said Article to try officers or soldiers of the Volunteer forces. A court-martial constituted of officers of the Regular Army for the trial of a volunteer would be without jurisdiction and its judgment void.[2] Officers of the Volunteers may, however, sit upon courts for the trial of officers or soldiers of the regular establishment, but not on courts for trial of militia.

Officers of the Regular Army who have been assigned to and been mustered into Volunteer service become a part of the Volunteer organization but cannot sit upon courts-martial, though holding their Volunteer rank, for the trial of officers and soldiers of Volunteers. (See ante, par. 51, note.)

[1] Dig. Op. J. A. G. 2450.

[2] Deming v. McClaughry, 113 Fed. Rep. 639, 640; McClaughry v. Deming, 186 U. S. 49.

THE MILITIA

**831. Art. 124. Officers of the militia of the several States, when called into the service of the United States, shall on all detachments, courts-martial, and other duty wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of the like grade in said regular or volunteer forces, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of the regular or volunteer forces of the United States.**[1]

**The Militia.**[2]—The militia of the United States is recognized by the Constitution, which gives to Congress the power to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and also for organizing, arming, and disciplining the militia, and governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress. (Constitution, Art. I, Sec. 8.) The Act of Congress approved January 21, 1903, and amended by the Act of May 27, 1908, provides "That the militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes—the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories, and the remainder to be known as the reserve militia."

[1] See ante, par. 51, 53, 134.

[2] See Act January 21, 1903, 32 Stat. at Large, p. 775; Act May 27, 1908; G. O. 99 War Dept. 1908; A. R. 454-467.

**Exemption.**—The Vice-President of the United States, the judicial and executive officers of the government, members and officers of each House of Congress, persons in the military and naval service of the United States, and certain persons who are in the performance of designated public functions, or employed in or upon works of public utility, or in sea service, members of religious sects whose creed forbids them to participate in war, and those who may be exempted by the laws of the respective States or Territories, are exempted from duty without regard to age.

**Organization.**—The regularly enlisted, organized, and uniformed active militia who participate in the apportionment of the annual appropriation provided by Sec. 1661 Rev. Stat. U. S., constitute the organized militia. The organization, armament, and discipline thereof shall be the same as that which is now or may hereafter be prescribed for the Regular Army of the United States; exceptions may be authorized in time of peace, by the Secretary of War. The President of the United States in time of peace may, by order, fix the minimum number of enlisted men in each company, troop, battery, signal corps, engineer corps, and hospital corps.

**How Called into Service.**[1]—Whenever the United States is invaded, or in danger of invasion, or of rebellion against the authority of the Government of the United States, or he is unable, with the regular forces at his command, to execute the laws of the Union, the President may call forth, for a period, which he may specify in his call, such number of the militia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and may issue his orders for that purpose through the Governor of the State or Territory, or the commanding general of the militia of the District of Columbia, to such officers of the militia as he may think proper. The militia when so called must continue to serve during the term specified, either within or without

[1] Act January 21, 1903, amended by Act of May 27, 1908; G. O. 7, War Dept. 1903; G. O. 99, War Dept. 1908.

the territory of the United States, unless sooner relieved by order of the President, but no commissioned officer or enlisted man thereof shall be held to service beyond the term of his existing commission or enlistment. The organized militia must be called into service in advance of any volunteer force. When the militia of more than one State is called into actual service of the United States, the President may apportion them among such States or Territories or to the District of Columbia according to representative population.

Officers and enlisted men so called forth shall be mustered for service without further enlistment or medical examination, except for those States and Territories which have not adopted the standard of medical examination prescribed for the Regular Army.

**When Subject to Military Law.**—Every officer and enlisted man of the militia who, upon being thus called forth, refuses or neglects to present himself for such muster, shall be subject to trial by court-martial and shall be punished as such court-martial may direct. But the majority membership of courts-martial for the trial of officers or men of the militia, when in the service of the United States, shall be composed of militia officers only. The militia when called into the actual service of the United States shall be subject to the same Rules and Articles of War as the regular troops of the United States.

**Pay and Allowances.**—When the militia, or any portion thereof, is called into the actual service of the United States, their pay and allowances are the same as for the regular troops and commence from the day of their appearing at the company rendezvous.

**Emergency Determined by the President.**—The power of determining whether an emergency exists justifying the call of the militia into the service of the United States lies with the President as Commander-in-Chief of the Army and Navy of the United States, who may issue his orders, in the manner above provided, to such officers of the militia

as he may think proper, and he may designate the quotas or contingent to be furnished by each State.

**Rank and Grade of Militia Officers in United States Service.**—"Officers of the militia of the several States, when called into the service of the United States, . . . take rank next after all officers of the like grade in the regular or volunteer forces, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of the regular or volunteer forces of the United States." [1]

**Militia in State Service.**—By the Constitutions of the several States, the Governor is *ex officio* Commander-in-Chief of the military forces thereof, and has the power to call the militia into the service of the State whenever in his opinion public exigency demands it.

**Conscription.**—The United States may also, if necessary, obtain the service of militia by exercise of the right of conscription. This right was exercised during the War of the Rebellion in Acts of July 17, 1862, March 3, 1863, and February 24, 1864. These Acts provided for a national enrollment under the authority of the United States, for an apportionment of quotas in accordance therewith, and authorized such quotas to be filled by conscription in the several districts into which each of the States was divided. Certain classes of persons were exempted from the operation of the conscription law, and drafted men were released from service upon the presentation of acceptable substitutes or by the payment of a sum specified in the statute. Those failing to report, without furnishing a substitute or payment of the sum fixed by statute, were to be deemed deserters and punished accordingly.

[1] 124th Article of War.
The militia being, under existing law, liable to be called into service for the entire period of their enlistment, and in advance of any call for volunteers, the provisions of this Article as to the precedence in rank

EFFECTS OF DECEASED OFFICERS AND SOLDIERS

**832. Art. 125. In case of the death of any officer, the major of his regiment, or the officer doing the major's duty, or the second officer in command at any post or garrison, as the case may be, shall immediately secure all his effects then in camp or quarters, and shall make, and transmit to the office of the Department of War, an inventory thereof.**[1]

The death of an officer, with place, cause, day, and hour, will be reported without delay, by telegraph, by his immediate commander directly to The Adjutant General of the Army, and also to the department commander. In case of the death of a retired officer, or of an officer on the active list who has no immediate commander, the medical officer, if one be present, or any officer having cognizance of the fact, will make the report to The Adjutant General of the Army.[2]

The inventories of effects, as required by this Article, will be transmitted to The Adjutant General of the Army. If legal representatives take possession of the effects, the fact will be stated in the inventory.[3] If no legal representatives are present to receive the effects, a list will be sent to the nearest relative of the deceased. If they are not claimed within a reasonable time, the effects, except sword, watches, personal papers, trinkets, and similar articles, which are to be labelled and sent through the Adjutant General to the Auditor for the War Department, for the benefit of those legally entitled to them, will be sold at auction and accounted for as in the case of deceased soldiers.[4]

A board of officers, to consist of three if practicable, will be convened by his commanding officer to inventory

of officers of volunteers, when employed in the service of the United States in conjunction with the militia, will undoubtedly be rescinded by Congressional enactment.

[1] See ante, par. 526.

[2] A. R. 83.

[3] A. R. 84.

[4] A. R. 85; see par. 833, p. 446 post.

and make returns for any public property or funds of which the deceased may have been in charge. These returns will be forwarded to the chief of the bureau to which the property or funds belong.

The remains of officers who die on duty within the continental limits of the United States will be enclosed in coffins and be transported to the nearest military post, or national cemetery, for burial. The remains of those who are killed in action, die at a military camp or in the field or hospital in Alaska or at places outside the continental limits of the United States, or while on voyage at sea, will, if desired by relatives or friends, be transported to their homes for interment, the cost of transportation being paid from funds specially appropriated for that purpose. Other expenses of burial are limited by regulations.[1]

The officer taking possession of the property and effects of the deceased is not an administrator and therefore has no authority to institute an action at law for the collection of any debt due the estate or for property withheld therefrom; nor can he act upon the effects left elsewhere than at the "camp or quarters" where the officer died.[2]

**833. Art. 126. In case of the death of any soldier, the commanding officer of his troop, battery, or company shall immediately secure all his effects then in camp or quarters, and shall, in the presence of two other officers, make an inventory thereof, which he shall transmit to the office of the Department of War.**

Similar rules exist relating to the disposal of the remains of enlisted men as those relating to officers, except that, if the commanding officer deems proper, the burial may be at the place of death, when a full report of the facts and reasons will be made to The Adjutant General of the Army; and where the death occurs in Alaska or

[1] See A. R. 87.
[2] Winthrop, Vol. 1, p. 1093; Dig. Op. J. A. G. 373.

outside the continental limits of the United States, or at sea, the request for transportation to the home of the deceased must be made by relatives only, and the expense of burial, other than the cost of transportation, is also limited by regulations.[1]

Where the soldier dies within the continental limits of the United States, except when killed in battle, there is no authority for the shipment of the remains to the home of the soldier at the request of relatives.[2]

The commanding officer, having complied with the provisions of this Article, should notify the nearest relative of the fact of death of the soldier.[3]

Effects of the deceased soldier not claimed within a reasonable time are to be sold by a council of administration under the authority of the post commander, and the proceeds transferred to the soldiers' immediate commander, by whom they will be deposited with a paymaster to the credit of the United States. Duplicate receipts will be taken, one to be sent direct to The Adjutant General of the Army and the other retained with the appropriate records. There is no authority for officers to pay the debts of deceased soldiers. Watches, trinkets, personal papers, and keepsakes will not be sold, but, labelled with the name, rank, and organization of the owner, will be sent directly to The Adjutant General of the Army, to be forwarded to the Auditor for the War Department for the benefit of those legally entitled to them. The above provision will also apply, as far as practicable, in the cases of deceased soldiers on the retired list of the Army whose effects may come within the control of the military authorities.[4]

[1] See A. R. 165.
[2] See Cir. 66, War Department, 1905.
[3] A. R. 160.
[4] A. R. 161, 162; Act June 30, 1906 (34 Stat. at Large, p. 750).

The "net proceeds" to be forwarded to the legal representatives of the deceased, as provided in paragraph 161, Army Regulations, relates to the proceeds of the sale of the effects of a deceased soldier after the necessary expenses of collection and sale have been deducted. The commander has no power as administrator and therefore cannot pay debts of the deceased from the net proceeds.

The "accounting" is for property in the "camp or quarters" where the soldier died; there is no authority under this Article to secure effects left elsewhere. "Upon accounting to the duly qualified legal representative as directed in the Article, the responsibility of the officer is discharged, and it remains for the representative to dispose of the property according to the law applicable to the case." [1]

**834. Art. 127. Officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased officers or soldiers. And no officer so charged shall be permitted to quit the regiment or post until he has deposited in the hands of the commanding officer all the effects of such deceased officers or soldiers not so accounted for and delivered.**

This Article requires that the responsibility for the property of deceased officers or soldiers be promptly assumed, and the property accounted for, by prohibiting the absence of any officer from his regiment or post until he has completed his accounting and is therefore released from the responsibility therefor.[2]

PUBLICATION OF ARTICLES

**835. Art. 128. The foregoing articles shall be read and published, once in every six months, to every garrison, regiment, troop, or company in the service of the United States, and shall be duly observed and obeyed by all officers and soldiers in said service.**

[1] Dig. Op. J. A. G. 373.

[2] For law regulating the disposition of the property of deceased officers or enlisted men of the Army, of less than five hundred dollars in value, where no demand therefor is made by a duly appointed legal representative, see Act June 30, 1906 (34 Stat. at Large, p. 750).

In order that officers and soldiers may be familiar with the laws by which they are governed, this Article requires the reading and publication of the foregoing Articles of War to all troops in the United States service at least once in every six months, and enjoins observance thereof, and obedience thereto, upon all officers and soldiers in the service.

A failure to make such publication is a neglect of duty, and of obedience to law, on the part of commanders, and it has frequently been pleaded and made a ground for mitigation of the punishment of soldiers, on their claim that they were not properly informed of the law, because of this lack of publication, relating to the offense of which they had been convicted.

### OTHER STATUTORY PROVISIONS AFFECTING THE ARMY

**836. Sec. 1343, R. S. All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death.**[1]

"A spy is a person who secretly, in disguise or under false pretenses, obtains, or seeks to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the enemy." [2]

The authority for trial by general court-martial under this section applies to "all persons" and therefore includes civilians; generally spies are persons in some way connected with, or employed by, the military power of the country with which we are at war. An officer or

[1] See ante, par. 54.

[2] Instructions for the government of armies of the United States in time of war, G. O. 100, A. G. O., 1863, as amended; Art. XII, Field Service Regulations, U. S. Army, 1905, par. 752.

soldier of the enemy who is found in or near a camp or post of our army disguised in the uniform or overcoat of a United States soldier is *prima facie* a spy and liable to trial as such; or where he, without authority and covertly, penetrates our lines disguised as a civilian, he is presumed to have come in the character of a spy; but he may, by satisfactory evidence of his having some other and innocent purpose, rebut the presumption against him and show that his offense was simply a violation of the laws of war.[1]

The essential elements of the offense consist in the attempted concealment, disguise, or deceit, with intent to secure information to communicate to the enemy. Soldiers not disguised, or soldiers or civilians carrying out their mission openly, or individuals sent in balloons, to deliver dispatches or maintain communication between the various parts of an army or territory are not to be considered as spies.[2]

The spy must be at the time *in flagrante delicto*,—taken in the very act of committing the offense. If he succeeds in making his return to his own army or country, the crime does not follow him, and if subsequently captured in battle or otherwise, he cannot properly be brought to trial as a spy.[3]

A spy is punishable with death by hanging whether he succeed or not in obtaining the information or conveying it to the enemy. But though taken in the act he shall not be punished until after trial and conviction.[4]

The trial by military commission also authorized in this Article is equally authorized by the laws of war, the military commission being specifically a war tribunal.[5]

[1] Dig. Op. J. A. G. 2346.
[2] See Field Service Regulations, U. S. Army, 1905, par. 753.
[3] Id., par. 756; Dig. Op. J. A. G. 2351.
[4] Field Service Regulations, U. S. Army, 1905, par. 754.
[5] See ante, par. 26, 32, 682–687.

837. Sec. 5306, R. S. Every officer of the United States, civil, military, or naval, and every sutler, soldier, marine, or other person, who takes, or causes to be taken into a State declared to be in insurrection, or to any other point to be thence taken into such State, or who transports or sells, or otherwise disposes of therein, any goods, wares, or merchandise whatsoever, except in pursuance of license and authority of the President, as provided in this title [see Sec. 5304], or who makes any false statement or representation upon which license and authority is granted for such transportation, sale, or other disposition, or who, under any license or authority obtained, wilfully and knowingly transports, sells, or otherwise disposes of any other goods, wares, or merchandise than such as are in good faith so licensed and authorized, or who wilfully and knowingly transports, sells, or disposes of the same, or any portion thereof, in violation of the terms of such license or authority, or of any rule or regulation prescribed by the Secretary of the Treasury concerning the same, or who is guilty of any act of embezzlement, of willful misappropriation of public or private money or property, of keeping false accounts, or of wilfully making any false returns, shall be deemed guilty of a misdemeanor, and shall be fined not more than five thousand dollars, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same.

This section makes cognizable by any court, civil or military, competent to try the same, the offense of trading without license with any State declared to be in insurrection, by every officer of the United States, civil, military, or naval, and every sutler, soldier, marine, or other person.

838. Sec. 5313, R. S. All persons in the military or naval service of the United States are prohibited from buying or selling, trading, or in any way dealing in captured or abandoned property, whereby they shall receive or expect any profit, benefit, or advantage to themselves, or any other person, directly or indirectly connected with them; and it shall be the duty of such person whenever such property comes into his possession or custody, or within his control, to give notice thereof to some agent, appointed by virtue of this title [see Sec. 5305], and to turn the same over to such agent without delay. Any officer of the

**United States, civil, military, or naval, or any sutler, soldier, or marine, or other person who shall violate any provision of this section shall be deemed guilty of a misdemeanor, and shall be fined not more than five thousand dollars, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same.**

This section forbids the buying, selling, trading, or dealing in captured or abandoned property, by all persons in the military or naval service of the United States, and makes the offense in such cases cognizable before any court, civil or military, competent to try the same.

**839. Section 1014, R. S. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.**

This section provides the method by which offenders against the laws of the United States may be arrested and brought to trial.

In case of any crime or offense against the United States complaint should, when possible, be made before a justice or judge of the United States or a United States commissioner; the United States Attorney should be consulted and the warrant be served by a United States marshal.

**Warrant.**—To secure a warrant for the arrest of any person offending against the laws of the United States, facts must be stated in the affidavit sufficient to give the court jurisdiction, and to justify the issue of the warrant by some court or official named in the section. The order of arrest is placed in the hands of the United States marshal, or other officer authorized to execute the same.

A warrant, and the complaint under oath on which the same is founded, to be legal, must not only state the crime and the name of the party against whom accusation is made, but also the time, place, and nature of the offense with reasonable certainty.[1]

**Search Warrant.**—It may be necessary to secure a search warrant to recover stolen property or property of the United States in the hands of persons who have illegally purchased or otherwise unlawfully secured the same. To obtain such warrant there should be a declaration of facts sufficient to constitute "probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized";[2] or, described as near as may be, so that both the property to be searched for and the place to be searched can be identified; and the owner or occupant of the place should also be designated. The search warrant being then issued to the proper officer authorized to execute the same, the army officer or other person making the charge, and affidavit or declaration under oath, must attend at the execution thereof, identify the articles and show them to the official executing the warrant, and the latter must see that they answer the description given therein.[3] Seizures of such property of the United States are not "unreasonable seizures" and are not within the

[1] Story on the Constitution, Vol. 2, Sec. 1902; Ex parte Buford, 3 Cranch (7 U. S.) 448.
[2] Amendment IV, Const. U. S.
[3] Boyd v. U. S., 116 U. S. 628.

prohibition of the 4th Amendment to the Constitution, or any other clause thereof.[1]

The "probable cause, supported by oath or affirmation," is the oath or affirmation of persons who of their own knowledge depose to the facts which constitute the offense; such probable cause cannot be presented to an official accuser or prosecutor for him to make the oath, but must be submitted to the committing magistrate, who may exercise his judgment on the sufficiency of the grounds stated therein for issue of the warrant.

Section 1014, Rev. Stat. United States, authorizes the usages of the State to be followed as to the process against offenders. But this, if it refers to anything more than the form of the warrant, could not include any usage expressly prohibited by the Constitution.[2]

"At common law, even in criminal cases, the legality of proceedings whereby stolen goods may be searched for was formerly doubted. But their legality has long been considered established on the ground of public necessity, because, without them, felons and other malefactors would escape detection";[3] and the seizing of stolen goods is now held authorized by the common law.[4]

At common law also it is usual for the search warrant to contain a direction to search for the goods mentioned in the daytime, and this would be the proper rule to follow in search warrants issued in cases under the United States laws which authorize the seizure of the property illegally in the possession of any person. It is specifically stated in the law concerning searches by officers of the customs, that such searches shall be in the daytime.[5]

[1] Boyd v. U. S., 116 U. S. 624.
[2] See Fed. Stat. Annotated, Vol. 9, p 254; U. S. v. Tureaud, 20 Fed. Rep. 622.
[3] Am. and Eng. Enc. of Law, Vol. 25, p. 145.
[4] See Boyd v. U. S., 116 U. S. 623, 628.
[5] Sec. 3066, Rev. Stat.

In executing the warrant the officer must adhere strictly to the directions contained therein and search the place described in the warrant, and seize only the goods which the warrant directs. He may break open an outer or inner door of a building if, after proper notice of his authority and purpose, he is refused admittance.[1]

When the official executing the warrant has found the property he should bring it, with the person in whose possession it is found, before the magistrate who issued the warrant, to be disposed of according to law.[2]

The search warrant should, when possible, be secured, in all cases of procedure against persons for violation of the federal laws, from a judge or justice of the United States, or some United States commissioner, so that both the person and property, in case of a search warrant, are held by United States authority.

The search warrant should contain a command to the United States marshal or other official to whom directed for execution, to bring the property found, together with the person in whose possession it is found, before the justice or other official issuing it, "to be disposed of according to law."

In general the United States commissioner is the most convenient of access, but if he fail to issue the search warrant, application should be made to the United States court for that district for its issue.

**840. Bail.**—Bail may be admitted upon all arrests in criminal cases, where the offense is not punishable by death, by any of the persons authorized to arrest and imprison offenders;[3] and it may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases only by the Supreme Court, or a

[1] Am. and Eng. Enc. of Law, Vol. 25, p. 148.
[2] Id.
[3] Sec. 1015, Rev. Stat.

circuit court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstances of the offense, and of the evidence, and to the usages of law.[1] Excessive bail must not be required.[2]

**841. An Act adopting laws of States for punishment of wrongful acts, not made penal by any law of Congress, committed in places under jurisdiction of the United States, but within the territorial limits of any State. (Sec. 272, 289, Chapter 11, Act of March 4, 1909, 35 St. L. 1142–1145.)**

**Sec. 289. Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section two hundred and seventy-two of this Act (land, etc., under exclusive control of the United States), shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District.[3]**

By the above statute, which replaces section 5391, Rev. Stat. U. S.,[4] it has been held that Congress has adopted the penal law of the various States so far as they deal with offenses that are not punishable by any law of the United States; but the Act does not define those offenses nor does it provide that all acts which may be offenses under the State laws shall be regarded as punishable by the United States, the object being the conservation of the property and peace of the latter. Whether they are so punishable or not, must be decided by the proper courts

[1] Sec. 1016, Rev. Stat.
[2] Amendments to the Constitution of the United States, Art. VIII.
[3] Act of March 4, 1909, 35 St. L. 1145.
[4] See Mil. Laws of the U. S., Davis, par. 1601, note 1, p. 613.

of the United States.[1] The laws put in force are those existing only on the date of the passage of this Act; laws of States, etc., subsequently made will not affect their validity or change them, until Congress adopts the new State, Territory, or District, laws by subsequent enactment.

**842. An Act for the punishment of persons who unlawfully enter upon any military reservation, army post, fort, or arsenal. (Sec. 45, Act March 4, 1909, 35 St. L. 1097.)**

**Sec. 45. Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reenter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.**

This law not only prohibits any person from entering upon any military reservation, army post, fort, etc., for any purpose prohibited by law or military regulation made in pursuance thereof, but it also provides for the punishment, through trial by the civil court of the United States, of any one who shall reenter, or be found therein, after having been removed therefrom, or who has been ordered not to reenter by the officer in command or person in charge thereof.

[1] Op. J. A. G., Nov. 24, 1906.

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[1] Manual for Courts-martial, edition 1908.

# APPENDIX A

## ARTICLES OF WAR

SECTION 1342, R. S. The armies of the United States shall be governed by the following rules and articles. The word officer, as used therein, shall be understood to designate commissioned officers, the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial.

ARTICLE 1. Every officer now in the Army of the United States shall, within six months from the passing of this act, and every officer hereafter appointed shall, before he enters upon the duties of his office, subscribe these rules and articles.

ART. 2. These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation, in the following form: "I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and articles of war." This oath may be taken before any commissioned officer of the Army.

ART. 3. Every officer who knowingly enlists or musters into the military service any minor over the age of 16 years without the written consent of his parents or guardians, or any minor under the age of 16 years, or any insane or intoxicated persons, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offense, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct.

ART. 4. No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer

of the regiment to which he belongs, or by the commanding officer, when no field officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

ART. 5. Any officer who knowingly musters as a soldier a person who is not a soldier shall be deemed guilty of knowingly making a false muster, and punished accordingly.

ART. 6. Any officer who takes money, or other thing, by way of gratification, on mustering any regiment, troop, battery, or company, or on signing muster rolls, shall be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.

ART. 7. Every officer commanding a regiment, an independent troop, battery, or company, or a garrison, shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. And any officer who, through neglect or design, omits to send such returns, shall, on conviction thereof, be punished as a court-martial may direct.

ART. 8. Every officer who knowingly makes a false return to the Department of War, or to any of his superior officers, authorized to call for such returns, of the state of the regiment, troop, or company, or garrison under his command; or of the arms, ammunition, clothing, or other stores thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered.[1]

ART. 9. All public stores taken from the enemy shall be secured for the service of the United States; and for neglect thereof the commanding officer shall be answerable.

ART. 10. Every officer commanding a troop, battery, or company, is charged with the arms, accouterments, ammunition, clothing, or other military stores belonging to his command, and is accountable to his colonel in case of their being lost, spoiled, or damaged otherwise than by unavoidable accident, or on actual service.

ART. 11. Every officer commanding a regiment or an independent troop, battery, or company, not in the field, may, when actually quartered with such command, grant furloughs to the enlisted men, in such numbers and for such time as he shall deem consistent with the good of the service. Every officer commanding

[1] "Cashiered" and "dismissed from the service" are now considered practically synonymous.

a regiment, or an independent troop, battery, or company, in the field, may grant furloughs not exceeding thirty days at one time, to five per cent of the enlisted men, for good conduct in the line of duty, but subject to the approval of the commander of the forces of which said enlisted men form a part. Every company officer of a regiment, commanding any troop, battery, or company not in the field, or commanding in any garrison, fort, post, or barrack, may, in the absence of his field officer, grant furloughs to the enlisted men, for a time not exceeding twenty days in six months, and not to more than two persons to be absent at the same time.

ART. 12. At every muster of a regiment, troop, battery, or company, the commanding officer thereof shall give to the mustering officer certificates, signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent non-commissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster rolls, shall be transmitted by the mustering officer to the Department of War as speedily as the distance of the place and muster will admit.

ART. 13. Every officer who signs a false certificate, relating to the absence or pay of an officer or soldier, shall be dismissed from the service.

ART. 14. Any officer who knowingly makes a false muster of man or horse, or who signs, or directs, or allows the signing of any muster roll, knowing the same to contain a false muster, shall, upon proof thereof by two witnesses, before a court-martial, be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.

ART. 15. Any officer who, willfully or through neglect, suffers to be lost, spoiled, or damaged, any military stores belonging to the United States, shall make good the loss or damage, and be dismissed from the service.

ART. 16. Any enlisted man who sells, or willfully or through neglect wastes the ammunition delivered out to him, shall be punished as a court-martial may direct.

ART. 17. Any soldier who sells, or through neglect loses or spoils his horse, arms, clothing, or accouterments, shall be punished as a court-martial may adjudge, subject to such limitations as may

be prescribed by the President by virtue of the power vested in him.[1]

ART. 18. Any officer commanding in any garrison, fort, or barracks of the United States who, for his private advantage, lays any duty or imposition upon, or is interested in, the sale of any victuals, liquors, or other necessaries of life, brought into such garrison, fort, or barracks, for the use of the soldiers, shall be dismissed from the service.

ART. 19. Any officer who uses contemptuous or disrespectful words against the President, the Vice-President, the Congress of the United States, or the chief magistrate or legislature of any of the United States in which he is quartered, shall be dismissed from the service, or otherwise punished, as a court-martial may direct. Any soldier who so offends shall be punished as a court-martial may direct.

ART. 20. Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct.

ART. 21. Any officer or soldier who, on any pretense whatsoever, strikes his superior officer, or draws or lifts up any weapon, or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior officer,[2] shall suffer death, or such other punishment as a court-martial may direct.

ART. 22. Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment, or guard, shall suffer death, or such other punishment as a court-martial may direct.

ART. 23. Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or having knowledge of any intended mutiny or sedition, does not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.

ART. 24. All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to his[3] own or to another corps, regiment, troop, battery, or company, and to order officers into arrest, and non-

[1] 17th A. W., as amended by Act of July 27, 1892. See G. O. 57 A. G. O., 1892.

[2] Disobedience of an order of a contract surgeon, of a dental surgeon, of a veterinarian, and a non-commissioned officer should be charged under the 62d Article of War. See Art. 62, Form *d*, Appendix E, 1. Disobedience of an order by a general prisoner also should be charged under the 62d Article of War.

[3] *Sic* in Revised Statutes.

commissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or non-commissioned officer, or draws a weapon upon him, shall be punished as a court-martial may direct.

ART. 25. No officer or soldier shall use any reproachful or provoking speeches or gestures to another. Any officer who so offends shall be put in arrest. Any soldier who so offends shall be confined, and required to ask pardon of the party offended in the presence of his commanding officer.

ART. 26. No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct.

ART. 27. Any officer or non-commissioned officer, commanding a guard, who, knowingly and willingly, suffers any person to go forth to fight a duel shall be punished as a challenger; and all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals, and punished accordingly. It shall be the duty of any officer commanding an army, regiment, troop, battery, company, post, or detachment, who knows or has reason to believe that a challenge has been given or accepted by any officer or enlisted man under his command, immediately to arrest the offender and bring him to trial.

ART. 28. Any officer or soldier who upbraids another officer or soldier for refusing a challenge shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept challenges, as they will only have acted in obedience to the law, and have done their duty as good soldiers, who subject themselves to discipline.

ART. 29. Any officer who thinks himself wronged by the commanding officer of his regiment, and, upon due application to such commander, is refused redress, may complain to the general commanding in the State or Territory where such regiment is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.

ART. 30. Any soldier who thinks himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such

regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial.[1]

ART. 31. Any officer or soldier who lies out of his quarters, garrison, or camp, without leave from his superior officer, shall be punished as a court-martial may direct.

ART. 32. Any soldier who absents himself from his troop, battery, company, or detachment, without leave from his commanding officer, shall be punished as a court-martial may direct.

ART. 33. Any officer or soldier who fails, except when prevented by sickness or other necessity, to repair, at the fixed time, to the place of parade, exercise or other rendezvous appointed by his commanding officer, or goes from the same, without leave from his commanding officer, before he is dismissed or relieved, shall be punished as a court-martial may direct.

ART. 34. Any soldier who is found one mile from camp, without leave in writing from his commanding officer, shall be punished as a court-martial may direct.

ART. 35. Any soldier who fails to retire to his quarters or tent at the beating of retreat, shall be punished according to the nature of his offense.

ART. 36. No soldier belonging to any regiment, troop, battery, or company shall hire another to do his duty for him, or be excused from duty, except in cases of sickness, disability, or leave of absence. Every such soldier found guilty of hiring his duty, and the person so hired to do another's duty, shall be punished as a court-martial may direct.

[1] The "regimental court-martial," under the 30th A. W., can not be used as a substitute for a general court-martial or court of inquiry, for it can not try an officer nor make an investigation for the purpose of determining whether he shall be brought to trial. When, if the soldier's complaint should be sustained, the only redress would be a reprimand to the officer, the matter would not be within the jurisdiction of this court. It can only investigate such matters as are susceptible to redress by the doing of justice to the complainant; that is, when in some way he can be set right by putting a stop to the wrongful condition which the officer has caused to exist. Erroneous stoppages of pay, irregularity of detail, the apparent requirement of more labor than from any other soldiers, and the like, might in this way be investigated and the wrongful condition put an end to. The court will in such cases record the evidence and its conclusions of fact, and recommend the action to be taken. The members of the court (and the judge-advocate) will be sworn faithfully to perform their duties as members (and judge-ad.ocate) of the court, and the proceedings will be recorded, as nearly as practicable, in the same manner as the proceedings of ordinary courts-martial.

ART. 37. Every non-commissioned officer who connives at such hiring of duty shall be reduced. Every officer who knows and allows such practices shall be punished as a court-martial may direct.

ART. 38. Any officer who is found drunk on his guard, party, or other duty, shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct. No court-martial shall sentence any soldier to be branded, marked, or tattooed.

ART. 39. Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall suffer death, or such other punishment as a court-martial may direct.

ART. 40. Any officer or soldier who quits his guard, platoon, or division, without leave from his superior officer, except in a case of urgent necessity, shall be punished as a court-martial may direct.

ART. 41. Any officer who, by any means whatsoever, occasions false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as a court-martial may direct.

ART. 42. Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct.

ART. 43. If any commander of any garrison, fortress, or post is compelled, by the officers and soldiers under his command, to give up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death, or such other punishment as a court-martial may direct.

ART. 44. Any person belonging to the armies of the United States who makes known the watchword to any person not entitled to receive it, according to the rules and discipline of war, or presumes to give a parole or watchword different from that which he received, shall suffer death, or such other punishment as a court-martial may direct.

ART. 45. Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct

ART. 46. Whosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial may direct

ART 47. Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts

the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.

ART. 48. Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried.

ART. 49. Any officer who, having tendered his resignation, quits his post or proper duties, without leave and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of the same, shall be deemed and punished as a deserter.

ART. 50. No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on a penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him and give notice thereof to the corps in which he last served, the said officer shall, by a court-martial, be cashiered.

ART. 51. Any officer or soldier who advises or persuades any other officer or soldier to desert the service of the United States, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.

ART. 52. It is earnestly recommended to all officers and soldiers diligently to attend divine service. Any officer who behaves indecently or irreverently at any place of divine worship shall be brought before a general court-martial, there to be publicly and severely reprimanded by the president thereof. Any soldier who so offends shall, for his first offense, forfeit one-sixth of a dollar; for each further offense he shall forfeit a like sum, and shall be confined twenty-four hours. The money so forfeited shall be deducted from his next pay, and shall be applied, by the captain or senior officer of his troop, battery, or company, to the use of the sick soldiers of the same.

ART 53. Any officer who uses any profane oath or execration shall, for each offense, forfeit and pay one dollar. Any soldier who so offends shall incur the penalties provided in the preceding article; and all moneys forfeited for such offenses shall be applied as therein provided.

ART. 54. Every officer commanding in quarters, garrison, or on

the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; and if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot, to the disquieting of the citizens of the United States, he refuses or omits to see justice done to the offender, and reparation made to the party injured, so far as part of the offender's pay shall go toward such reparation, he shall be dismissed from the service, or otherwise punished as a court-martial may direct.

ART. 55. All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish ponds, houses, gardens, grain fields, inclosures, or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States (unless by order of a general officer commanding a separate army in the field), shall, besides such penalties as he may be liable to by law, be punished as a court-martial may direct.

ART. 56. Any officer or soldier who does violence to any person bringing provisions or other necessaries to the camp, garrison, or quarters of the forces of the United States in foreign parts, shall suffer death, or such other punishment as a court-martial may direct.

ART. 57. Whosoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their Territories during rebellion against the supreme authority of the United States, forces a safe-guard, shall suffer death.

ART. 58. In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or an assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or District in which such offense may have been committed.

ART. 59. When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their

utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.[1]

ART. 60. Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

[2] Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

[3] Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

[4] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States, or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statement; or

[5] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

[6] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

[7] Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

[8] Who, being authorized to make or deliver any paper certifying

[1] Municipal ordinances and by-laws are part of the "laws of the land" within the meaning of the phrase as used in the 59th A. W. (Opin. of Atty. Gen. See cir. 15, A. G. O., 1894.)

the receipt of any property of the United States, furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

[9] Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof; or

[10] Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same,

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, *or by any or all of said penalties.*[1] And if any person, being guilty of any of the offenses aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

ART. 61. Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

ART. 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison, or field officers [2] court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.[3]

[1] The words in italics were added by Act of March 2, 1901. See Appendix C.

[2] The "field officers'" court was abolished by Sec. 2 of the summary court act of June 18, 1898. See Appendix B.

[3] "SEC. 3. That fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offense and made punishable by court-martial, under the 62d Article of War." (Act of July 27, 1892. See G. O. 57, A. G. O., 1892.) For definition of fraudulent enlistment, see *ante*, par. 710, and for forms for charges see Appendix E.

ART. 63. All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war.

ART. 64. The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall, at all times and in all places, be governed by the Articles of War, and shall be subject to be tried by courts-martial.

ART. 65. Officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer. And any officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed from the service.

ART. 66. Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority.

ART. 67. No provost marshal, or officer commanding a guard, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime charged against the prisoner.

ART. 68. Every officer to whose charge a prisoner is committed shall, within twenty-four hours after such commitment, or as soon as he is relieved from his guard, report in writing, to the commanding officer, the name of such prisoner, the crime charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.

ART. 69. Any officer who presumes, without proper authority, to release any prisoner committed to his charge, or suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

ART. 70. No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.

ART. 71. When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required the arrest shall

cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest.

ART. 72. Any general officer commanding an army, a Territorial division or a department, or colonel commanding a separate department, may appoint general courts-martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President for his approval or orders in the case.[1]

ART. 73. In time of war the commander of a division, or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander.

ART. 74. Officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same.

ART. 75. General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service.

ART. 76. When the requisite number of officers to form a general court-martial is not present in any post or detachment, the commanding officer shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall thereupon order a court to be assembled at the nearest post or department at which there may be such a requisite number of officers, and shall order the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled.

ART. 77. Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Article 78.

ART. 78. Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present and duly authorized, shall be obeyed.

ART 79. Officers shall be tried only by general courts-martial;

[1] Act of July 5, 1884. See G. O. 73, A. G. O., 1884.

and no officer shall, when it can be avoided, be tried by officers inferior to him in rank.[1]

ART. 81. Every officer commanding a regiment or corps shall, subject to the provisions of Article 80, be competent to appoint, for his own regiment or corps, courts-martial, consisting of three officers, to try offenses not capital.

ART. 82. Every officer commanding a garrison, fort, or other place, where the troops consist of different corps, shall, subject to the provisions of Article 80, be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offenses not capital.

ART. 83. Regimental and garrison courts-martial and summary courts, detailed under existing laws to try enlisted men, shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto, in the case of non-commissioned officers, reduction to the ranks, and in the case of first-class privates reduction to second-class privates: *Provided*, That a summary court shall not adjudge confinement and forfeiture in excess of a period of one month unless the accused shall before trial consent in writing to trial by said court, but in any case of refusal to so consent the trial may be had either by general, regimental, or garrison court-martial, or by said summary court, but in case of trial by said summary court without consent as aforesaid the court shall not adjudge confinement or forfeiture of pay for more than one month.[2]

ART. 84. The judge-advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial: "You, A. B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority, except to the judge-advocate; neither will you disclose or discover the vote or opinion

[1] Art. 80 repealed by Act of June 18, 1898, Sec. 2. See Appendix B.
[2] 83d A. W., as amended by Act of March 2, 1901. See Appendix C.

of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law. So help you God."

ART. 85. When the oath has been administered to the members of a court-martial, the president of the court shall administer to the judge-advocate, or person officiating as such, an oath in the following form: "You, A. B., do swear that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same. So help you God."

ART. 86. A court-martial may punish, at discretion, any person who uses any menacing words, signs, or gestures, in its presence, or who disturbs its proceedings by any riot or disorder.

ART. 87. All members of a court-martial are to behave with decency and calmness.

ART. 88. Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

ART. 89. When a prisoner, arraigned before a general court-martial, from obstinacy and deliberate design, stands mute or answers foreign to the purpose, the court may proceed to trial and judgment as if the prisoner had pleaded not guilty.

ART. 90. The judge-advocate, or some person deputed by him, or by the general or officer commanding the Army, detachment, or garrison, shall prosecute in the name of the United States, but when the prisoner has made his plea, he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner the answer to which might tend to criminate himself.

ART. 91. The depositions of witnesses residing beyond the limits of the State, Territory, or District in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital.[1]

ART. 92. All persons who give evidence before a court-martial shall be examined on oath, or affirmation, in the following form:

[1] "SEC. 4. That judge-advocates of departments and of courts-martial, and the trial officers of summary courts, are hereby authorized to administer oaths for the purposes of the administration of military justice, and for other purposes of military administration." (Act of July 27, 1892. See G. O. 57, A. G. O., 1892.)

"You swear (or affirm) that the evidence you shall give, in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God."

ART. 93. A court-martial shall, for reasonable cause, grant a continuance to either party, for such time, and as often, as may appear to be just: *Provided*, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.[1]

ART. 95. Members of a court-martial, in giving their votes, shall begin with the youngest in commission.

ART. 96. No person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned.

ART. 97. No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment.

ART. 98. No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.

ART. 99. No officer shall be discharged or dismissed from the service, except by order of the President, or by sentence of a general court-martial; and in time of peace no officer shall be dismissed, except in pursuance of the sentence of a court-martial, or in mitigation thereof.

ART. 100. When an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name and place of abode of the delinquent shall be published in the newspapers in and about the camp, and in the State from which the offender came, or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.

ART. 101. When a court-martial suspends an officer from command it may also suspend his pay and emoluments for the same time, according to the nature of his offense.

ART. 102. No person shall be tried a second time for the same offense.

ART. 103. No person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order

[1] Art. 94 repealed by Act of March 2, 1901, Sec. 2. See Appendix C.

for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period.

No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was mustered into the service.[1]

ART. 104. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being.[2]

ART. 105. No sentence of a court-martial, inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerrilla marauders, convicted in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon confirmation by the commanding general in the field, or the commander of the department, as the case may be.

ART. 106. In time of peace no sentence of a court-martial, directing the dismissal of an officer, shall be carried into execution, until it shall have been confirmed by the President.

ART. 107. No sentence of a court-martial appointed by the commander of a division or of a separate brigade of troops, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the general commanding the army in the field to which the division or brigade belongs.

ART. 108. No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer, shall be carried into execution until it shall have been confirmed by the President.

ART. 109. All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court, or by

[1] 103d A. W., as amended by Act of April 11, 1890. See G. O. 45 A. G. O., 1890.

[2] 104th A. W., as amended by Act of July 27, 1892. See G. O. 57, A. G. O., 1892.

the officer commanding for the time being, where confirmation by the President, or by the commanding general in the field, or commander of the department, is not required by these articles.[1]

ART. 111. Any officer who has authority to carry into execution the sentence of death, or of dismissal of an officer, may suspend the same until the pleasure of the President shall be known; and, in such case, he shall immediately transmit to the President a copy of the order of suspension, together with a copy of the proceedings of the court.

ART. 112. Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held shall have power to pardon or mitigate any punishment which such court may adjudge.[2]

ART. 113. Every judge-advocate, or person acting as such, at any general court-martial, shall, with as much expedition as the opportunity of time and distance of place may admit, forward the original proceedings and sentence of such court to the Judge-Advocate-General of the Army, in whose office they shall be carefully preserved.

ART. 114. Every party tried by a general court-martial shall, upon demand thereof made by himself or by any person in his behalf, be entitled to a copy of the proceedings and sentence of such court.

ART. 115. A court of inquiry, to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier, may be ordered by the President or by any commanding officer; but, as courts of inquiry may be perverted to dishonorable purposes, and may be employed, in the hands of weak and envious commandants, as engines for the destruction of military merit, they shall never be ordered by any commanding officer, except upon a demand by the officer or soldier whose conduct is to be inquired of.

ART. 116. A court of inquiry shall consist of one or more officers, not exceeding three, and a recorder, to reduce the proceedings and evidence to writing.

ART. 117. The recorder of a court of inquiry shall administer to the members the following oath: "You shall well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or

[1] Art. 110 repealed by Act of June 18, 1898, Sec. 2. See Appendix B.
[2] See par. 951, A. R.

hope of reward. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."

ART. 118. A court of inquiry, and the recorder thereof, shall have the same power to summon and examine witnesses as is given to courts-martial and the judge-advocates thereof. Such witnesses shall take the same oath which is taken by witnesses before courts-martial, and the party accused shall be permitted to examine and cross-examine them, so as fully to investigate the circumstances in question.

ART. 119. A court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so.

ART. 120. The proceedings of a court of inquiry must be authenticated by the signatures of the recorder and the president thereof, and delivered to the commanding officer.

ART. 121. The proceedings of a court of inquiry may be admitted as evidence by a court-martial, in cases not capital, nor extending to the dismissal of an officer: *Provided*, That the circumstances are such that oral testimony can not be obtained.

ART. 122. If, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President, according to the nature of the case.

ART. 123. In all matters relating to the rank, duties, and rights of officers, the same rules and regulations shall apply to officers of the Regular Army and to volunteers commissioned in, or mustered into said service, under the laws of the United States, for a limited period.

ART. 124. Officers of the militia of the several States, when called into the service of the United States, shall on all detachments, courts-martial, and other duty wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of the like grade in said regular or volunteer forces, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of the regular or volunteer forces of the United States.

ART. 125. In case of the death of any officer, the major of his regiment, or the officer doing the major's duty, or the second

officer in command at any post or garrison, as the case may be, shall immediately secure all his effects then in camp or quarters, and shall make, and transmit to the office of the Department of War, an inventory thereof.

ART. 126. In case of the death of any soldier, the commanding officer of his troop, battery, or company shall immediately secure all his effects then in camp or quarters, and shall, in the presence of two other officers, make an inventory thereof, which he shall transmit to the office of the Department of War.

ART. 127. Officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased officers or soldiers. And no officer so charged shall be permitted to quit the regiment or post until he has deposited in the hands of the commanding officer all the effects of such deceased officers or soldiers not so accounted for and delivered.

ART. 128. The foregoing articles shall be read and published, once in every six months, to every garrison, regiment, troop, or company in the service of the United States, and shall be duly observed and obeyed by all officers and soldiers in said service.

## OTHER STATUTORY PROVISIONS DEFINING COURT-MARTIAL OFFENSES

SEC. 1343, R. S. All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death.

SEC. 5306, R. S. Every officer of the United States, civil, military, or naval, and every sutler, soldier, marine, or other person, who takes, or causes to be taken into a State declared to be in insurrection, or to any other point to be thence taken into such State, or who transports or sells, or otherwise disposes of therein, any goods, wares, or merchandise whatsoever, except in pursuance of license and authority of the President, as provided in this Title [see Sec. 5304], or who makes any false statement or representation upon which license and authority is granted for such transportation, sale, or other disposition, or who, under any license or authority obtained, willfully and knowingly transports, sells, or otherwise disposes of any other goods, wares, or merchandise than such as

are in good faith so licensed and authorized, or who willfully and knowingly transports, sells, or disposes of the same, or any portion thereof, in violation of the terms of such license or authority, or of any rule or regulation prescribed by the Secretary of the Treasury concerning the same, or who is guilty of any act of embezzlement, of willful misappropriation of public or private money or property, of keeping false accounts, or of willfully making any false returns, shall be deemed guilty of a misdemeanor, and shall be fined not more than five thousand dollars, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same.

SEC. 5313, R. S. All persons in the military or naval service of the United States are prohibited from buying or selling, trading, or in any way dealing in captured or abandoned property, whereby they shall receive or expect any profit, benefit, or advantage to themselves, or any other person, directly or indirectly connected with them; and it shall be the duty of such person whenever such property comes into his possession or custody, or within his control, to give notice thereof to some agent, appointed by virtue of this Title [see Sec. 5305], and to turn the same over to such agent without delay. Any officer of the United States, civil, military, or naval, or any sutler, soldier, or marine, or other person who shall violate any provision of this section, shall be deemed guilty of a misdemeanor, and shall be fined not more than five thousand dollars, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same.

# APPENDIX B

## ACT ESTABLISHING THE SUMMARY COURT

*Be it enacted, etc.*, That the Act entitled "An act to promote the administration of justice in the Army," approved October first, eighteen hundred and ninety, as supplemented and amended by subsequent legislation, be, and the same is hereby, amended so as to read as follows:

"That the commanding officer of each garrison, fort, or other place, regiment or corps, detached battalion, or company, or other detachment in the Army, shall have power to appoint for such place or command, or in his discretion for each battalion thereof, a summary court to consist of one officer to be designated by him, before whom enlisted men [1] who are to be tried for offenses, such as were prior to the passage of the Act 'to promote the administration of justice in the Army,' approved October first, eighteen hundred and ninety, cognizable by garrison or regimental courts-martial, and offenses cognizable by field officers detailed to try offenders under the provisions of the eightieth and one hundred and tenth articles of war, shall be brought to trial within twenty-four hours of the time of the arrest, or as soon thereafter as practicable, except when the accused is to be tried by general court-martial; but such summary court may be appointed and the officer designated by superior authority when by him deemed desirable; and the officer holding the summary court shall have power to administer oaths and to hear and determine such cases, and when satisfied of the guilt of the accused adjudge the punishment to be inflicted, which said punishment shall not exceed confinement at hard labor for one month and forfeiture of one month's pay, and, in the case of a non-commissioned officer, reduction to the ranks in addition thereto; that there shall be a summary court record kept at each military post and in the field at the headquarters of the proper command, in which shall be entered

[1] Retainers to the camp and other classes of persons mentioned in the 63d A. W. are not triable by summary court.

a record of all cases heard and determined and the action had thereon; and no sentence adjudged by said summary court shall be executed until it shall have been approved by the officer appointing the court, or by the officer commanding for the time being: *Provided*, That when but one commissioned officer is present with a command he shall hear and finally determine such cases: *And provided further*, That no one while holding the privileges of a certificate of eligibility to promotion shall be brought before a summary court, and that non-commissioned officers shall not, if they object thereto, be brought to trial before summary courts without the authority of the officer competent to order their trial by general court-martial, but shall in such cases be brought to trial before garrison, regimental, or general courts-martial, as the case may be."

SEC. 2. That articles eighty and one hundred and ten of the Rules and Articles for the Government of the Armies of the United States be, and the same are hereby, repealed.

SEC. 3. That the commanding officers authorized to approve the sentences of summary courts and superior authority shall have power to remit or mitigate the same.

SEC. 4. That post and other commanders shall, in time of peace, on the last day of each month, make a report to the department headquarters of the number of cases determined by summary court during the month, setting forth the offenses committed and the penalties awarded, which report shall be filed in the office of the judge-advocate of the department, and may be destroyed when no longer of use.

SEC. 5. That soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice.

SEC. 6. That it shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, or District, to arrest offenders, to summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authority of the General Government.

SEC. 7. That this Act shall take effect sixty days after its passage.

*Approved June 18, 1898.*

# APPENDIX C

## ACT TO PREVENT THE FAILURE OF MILITARY JUSTICE

*Be it enacted, etc.*, That every person not belonging to the Army of the United States who, being duly subpœnaed to appear as a witness before a general court-martial of the Army, willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States; and it shall be the duty of the United States district attorney, on the certification of the facts to him by the general court-martial, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than five hundred dollars or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That this shall not apply to persons residing beyond the State, Territory, or District in which such general court-martial is held, and that the fees of such witness, and his mileage at the rates provided for witnesses in the United States district court for said State, Territory or District shall be duly paid or tendered said witness, such amounts to be paid by the Pay Department of the Army out of the appropriation for compensation of witnesses: *Provided*, That no witness shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.

SEC. 2. That article ninety-four, section thirteen hundred and forty-two, of the Revised Statutes of the United States be, and the same is hereby, repealed.

SEC. 3. That section one hundred and eighty-three of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"SEC. 183. Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army detailed to conduct an investigation, and the recorder, and, if there be none, the presiding officer of any military board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation."

SEC. 4. That article eighty-three, section thirteen hundred and forty-two, of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows:

"ARTICLE 83. Regimental and garrison courts-martial and summary courts detailed under existing laws to try enlisted men shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto, in the case of non-commissioned officers reduction to the ranks and in the case of first-class privates reduction to second-class privates: *Provided*, That a summary court shall not adjudge confinement and forfeiture in excess of a period of one month, unless the accused shall before trial consent in writing to trial by said court, but in any case of refusal to so consent, the trial may be had either by general, regimental, or garrison court-martial, or by said summary court, but in case of trial by said summary court without consent as aforesaid, the court shall not adjudge confinement or forfeiture of pay for more than one month."

SEC. 5. That article sixty, section thirteen hundred and forty-two, of the Revised Statutes of the United States be, and the same is hereby, amended by inserting after the words "shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge," the words "or by any or all of said penalties."

*Approved March 2, 1901.*

# APPENDIX D

## EXECUTIVE ORDER ESTABLISHING LIMITS OF PUNISHMENT

GENERAL ORDERS, No. 204. } WAR DEPARTMENT, WASHINGTON, *December 15, 1908.*

The following Executive order is published for the information and guidance of all concerned:

The Executive Order, dated June 12, 1905, establishing limits of punishment for enlisted men of the Army, under an Act of Congress approved September 27, 1890, and which was published in General Orders, No. 96, War Department, Washington, June 19, 1905, is amended so as to prescribe, for time of peace, as follows:

### ARTICLE I

In all cases of desertion the sentence may include dishonorable discharge and forfeiture of pay and allowance.

SEC. 1. Subject to the modifications authorized in section 2 of this article, the maximum limit of the term of confinement (at hard labor) for desertion committed in time of peace shall be three (3) years.

SEC. 2. The foregoing limitations are subject to modification under the following conditions:

(*a*) The punishment of a deserter may be increased by one year of confinement at hard labor in consideration of each previous conviction of desertion.

(*b*) The punishment for desertion when joined in by two or more soldiers in the execution of a conspiracy, or for desertion in the presence of an outbreak of Indians or of any unlawful assemblage which the troops may be opposing, shall not exceed dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for five years.

ARTICLE II.

Except as herein otherwise indicated, punishments shall not exceed the limits prescribed in the following table:

| Offenses. | Limits of punishment. |
|---|---|
| UNDER 17TH ARTICLE OF WAR. | |
| Selling horse or arms, or both .. | Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three years. |
| Selling accoutrements or clothing. | Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one year. |
| Losing or spoiling horse or arms through neglect. | Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Losing or spoiling accoutrements or clothing through neglect. | Three months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| UNDER 20TH ARTICLE OF WAR. | |
| Behaving himself with disrespect to his commanding officer. | Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| UNDER 24TH ARTICLE OF WAR. | |
| Refusal to obey or using violence to officer or non-commissioned officer while quelling quarrels or disorders. | Dishonorable discharge, with forfeiture of all pay and allowances and confinement at hard labor for two years. |

| Offenses. | Limits of punishment. |
|---|---|
| UNDER 32D ARTICLE OF WAR. | |
| Absence without leave [1]— | |
| For not more than six hours. | Forfeiture of $2; corporal, $3; sergeant, $4; 1st sergeant or noncommissioned officer of higher grade, $5. |
| For more than six to twenty-four hours, inclusive. | Forfeiture of $5; corporal, $6, sergeant, $7, 1st sergeant or noncommissioned officer of higher grade, $10. |
| For more than one to ten days, inclusive. | Forfeiture of $10 and 10 days' confinement at hard labor; for noncommissioned officer, reduction in addition thereto. |
| For more than ten days.... | Dishonorable discharge and forfeiture of all pay and allowances, and six months' confinement at hard labor. |
| UNDER 33D ARTICLE OF WAR. | |
| Failure to repair at the time fixed, to the place appointed, etc.— | |
| For reveille or retreat roll call and 11 p.m. inspection. | Forfeiture of $1; corporal, $2; sergeant, $3; 1st sergeant, $4. |
| For assembly of guard detail.<br>For guard mounting (by musician detailed for guard). | Forfeiture of $5; corporal, $8; sergeant, $10. |

[1] Upon trial for desertion and conviction of absence without leave only, the court may, in addition to the limit prescribed for such absence, award a stoppage of the amount paid as reward for the apprehension and delivery of the accused to the military authorities.

| Offenses. | Limits of punishment. |
|---|---|
| UNDER 33D ARTICLE OF WAR—Continued. | |
| For guard mounting (by musician not detailed for guard)<br>For assembly of fatigue detail<br>For parade<br>For inspection and muster, weekly or monthly inspection<br>For target practice<br>For drill<br>For stable duty<br>For athletic exercises<br>For post school | Forfeiture of $2; corporal, $3; sergeant, $5. |
| UNDER 38TH ARTICLE OF WAR. | |
| Found drunk— | |
| On guard | Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| On duty as head cook | Forfeiture of $20. |
| On extra or special duty<br>At formation of company for drill or on drill<br>At target practice<br>At formation of company for dress parade or on dress parade<br>At reveille or retreat roll call.<br>At inspection and muster, weekly or monthly inspection<br>At inspection of company guard detail or at guard mounting<br>At stable duty<br>On fatigue | Forfeiture of $12; for non-commissioned officer, reduction and forfeiture of $20. |
| UNDER 40TH ARTICLE OF WAR. | |
| Quitting guard | Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |

| Offenses. | Limits of punishment. |
|---|---|
| UNDER 51ST ARTICLE OF WAR. | |
| Persuading soldiers to desert. | Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor. |
| UNDER 60TH ARTICLE OF WAR. | Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor. |
| UNDER 62D ARTICLE OF WAR | |
| Manslaughter. . . . . | Dishonorable discharge, forfeiture of all pay and allowances, and ten years' confinement at hard labor. |
| Assault with intent to kill. . . . . | Dishonorable discharge, forfeiture of all pay and allowances, and ten years' confinement at hard labor. |
| Burglary. . . . . | Dishonorable discharge, forfeiture of all pay and allowances, and seven years' confinement at hard labor. |
| Forgery. . . . . | Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor. |
| Perjury. . . . . | Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor. |
| False swearing. . . . . | Dishonorable discharge, forfeiture of all pay and allowances, and two years' confinement at hard labor. |
| Robbery. . . . . | Dishonorable discharge, forfeiture of all pay and allowances, and seven years' confinement at hard labor. |
| Larceny or embezzlement of property [1]— | |
| Of the value of more than $100. | Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor. |
| Of the value of $100 or less and more than $50. | Dishonorable discharge, forfeiture of all pay and allowances, and three years' confinement at hard labor. |
| Of the value of $50 or less and more than $20. | Dishonorable discharge, forfeiture of all pay and allowances, and two years' confinement at hard labor. |
| Of the value of $20 or less. . | Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor. |
| Fraudulent enlistment, procured by false representation or concealment of a fact in regard to a prior enlistment or discharge, or in regard to conviction of a civil or military crime. | Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one year. |

[1] In specifications to charges of larceny or embezzlement the value of the property shall be stated.

| Offenses. | Limits of punishment. |
|---|---|
| UNDER 62D ARTICLE OF WAR—Continued. | |
| Fraudulent enlistment, other cases of. | Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months. |
| Disobedience of orders, involving willful defiance of the authority of a non-commissioned officer in the execution of his office. | Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Using threatening or insulting language or behaving in an insubordinate manner to a non-commissioned officer while in the execution of his office. | Two months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto |
| Absence from fatigue duty..... | Forfeiture of $4; corporal, $5; sergeant, $6. |
| Absence from extra or special duty. | Forfeiture of $4; corporal, $5; sergeant, $6. |
| Absence from duty as company, general mess, or hospital head cook. | Forfeiture of $10. |
| Introducing liquor into post, camp, or quarters in violation of standing orders | Forfeiture of $3; for non-commissioned officer, reduction and forfeiture of $5. |
| Drunkenness at post or in quarters. | Forfeiture of $3; for non-commissioned officer, reduction and forfeiture of $5. |
| Drunkenness and disorderly conduct, causing the offender's arrest and conviction by civil authorities at a place within ten miles of his station. | Forfeiture of $10 and seven days' confinement at hard labor; for non-commissioned officer, reduction and forfeiture of $12. |
| Noisy or disorderly conduct in quarters. | Forfeiture of $4; corporal, $7; sergeant, $10. |
| Drunk and disorderly in post or quarters. | Forfeiture of $7; for non-commissioned officer, reduction and forfeiture of $10. |
| Abuse by non-commissioned officer of his authority over an inferior. | Reduction, three months' confinement at hard labor, and forfeiture of $10 per month for the same period. |
| Non-commissioned officer encouraging gambling. | Reduction and forfeiture of $5. |
| Non-commissioned officer making false report. | Reduction, forfeiture of $8, and ten days' confinement at hard labor. |
| Sentinel allowing a prisoner under his charge to escape through neglect. | Six months' confinement at hard labor and forfeiture of $10 per month for the same period. |
| Sentinel willfully suffering prisoner under his charge to escape. | Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor. |

| Offenses. | Limits of punishment. |
|---|---|
| UNDER 62D ARTICLE OF WAR—Continued. | |
| Sentinel allowing a prisoner under his charge to obtain liquor. | Two months' confinement at hard labor and forfeiture of $10 per month for the same period. |
| Sentinel or member of guard drinking liquor with prisoners. | Two months' confinement at hard labor and forfeiture of $10 per month for the same period. |
| Disrespect or affront to a sentinel. | Two months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Resisting or disobeying sentinel in lawful execution of his duty. | Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Lewd or indecent exposure of person. | Three months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Committing nuisance in or about quarters. | |
| Breach of arrest in quarters..... | One month's confinement at hard labor and forfeiture of $10; for non-commissioned officer, reduction in addition thereto. |

## ARTICLE III

The introduction and use of evidence of previous convictions is subject to the following regulations:

SECTION 1. Such evidence shall be limited, except as provided in section 5 of this article, to previous convictions by courts-martial of an offense or offenses within one year preceding the date of commission of any offense charged and during the current enlistment. These convictions must be proved by the records of previous trials and convictions, or by duly authenticated copies of such records, or by duly authenticated copies of the orders promulgating such trials and convictions. Charges forwarded to the authority competent to order a general court-martial, or submitted to a summary, garrison, or regimental court-martial, must be accompanied by the proper evidence of previous convictions.

SEC. 2. Whenever a soldier is convicted of an offense for which a discretionary punishment is authorized, the court will receive evidence of previous convictions (see section 1 of this article),

if there be any. General, regimental, and garrison courts-martial will, after a finding of guilty, be opened for the purpose of ascertaining whether there is such evidence and, if so, of receiving it.

SEC. 3. *Previous convictions in connection with inferior court offenses.*—When a soldier is convicted of an offense the punishment for which under Article II of this order or the custom of the service does not exceed three months' confinement at hard labor and forfeiture of three months' pay, the punishment so authorized may, upon proof of previous convictions (see section 1 of this article), be increased one-half for each of such convictions *up to the limit* of three months' confinement at hard labor and forfeiture of three months' pay, and, for non-commissioned officer or first-class private, reduction in addition thereto. In case of a soldier, whose total length of service does not exceed one year, upon proof of five or more such convictions, if the total of the sentences, substitutions considered (see Article VII), equals or exceeds forfeiture of $50 or confinement at hard labor for 100 days, the limit of punishment shall be dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three months: but in cases where the length of service exceeds one year, the limit of punishment shall be as just stated upon proof of five or more previous convictions whatever the character of the sentences may have been. But if dishonorable discharge be not adjudged, the limit shall be three months' confinement at hard labor and forfeiture of three months' pay, and, for a non-commissioned officer or first-class private, reduction in addition thereto.

SEC. 4. *Previous convictions in connection with general court-martial offenses.*—When the conviction is for an offense punishable under Article II of this order or the custom of the service with a greater punishment than three months' confinement at hard labor and forfeiture of three months' pay, such punishment shall not be increased by reason of previous convictions, except as hereinafter specified; but evidence of those described in section 1 of this article will be submitted to the court to aid it to determine upon the proper measure of punishment subject to the limit already authorized. In the case of a soldier whose total length of service does not exceed one year, upon proof of five or more of such convictions, if the total of the sentences, substitutions considered (see Article VII), equals or exceeds forfeiture of $50 or confinement at hard labor for 100 days, the court may, if the authorized limit does not include dishonorable discharge, adjudge dishonorable discharge and forfeiture of all pay and allowances with the authorized confinement: but in cases where the length of service exceeds one year, the limit of punishment shall be as just stated,

upon proof of five or more previous convictions, whatever the character of the sentences may have been.

SEC. 5. On a conviction of desertion evidence of convictions of previous desertions may also be introduced, irrespective of the enlistment or of the period which may have elapsed since such conviction or convictions.

SEC. 6. When a non-commissioned officer is convicted of an offense not punishable with reduction, he may, upon proof of one previous conviction within the prescribed period (see section 1 of this article), be sentenced to reduction in addition to the punishment already authorized.

SEC. 7. First-class privates may be reduced to second-class privates in all cases where for like offenses on the part of non-commissioned officers their reduction in grade is now authorized.

### ARTICLE IV

When a soldier shall, on one arraignment, be convicted of two or more offenses, none of which is punishable under Article II of this order or the custom of the service with dishonorable discharge, but the aggregate term of confinement for which, as specified in said article, may exceed six months, dishonorable discharge with forfeiture of pay and allowances may be awarded in addition to the authorized confinement.

### ARTICLE V

If, in any case where the limit of punishment is dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for a stated number of months, dishonorable discharge be not adjudged, the limit of forfeiture shall be all pay due and to become due during the prescribed limit of confinement.

### ARTICLE VI

This order prescribes the *maximum* limit of punishment for the offenses named, and this limit is intended for those cases in which the severest punishment should be awarded. In other cases the punishment should be graded down according to the extenuating circumstances. Offenses not herein provided for remain punishable as authorized by the Articles of War and the custom of the service.

ARTICLE VII

Substitutions for punishment named in Article II of this order are authorized at the discretion of the courts at the following rates:

Two days' confinement at hard labor for one dollar forfeiture, or the reverse; one day's solitary confinement on bread and water diet for two days' confinement at hard labor or for one dollar forfeiture; provided that a non-commissioned officer not sentenced to reduction shall not be subject to confinement; and provided that solitary confinement shall not exceed fourteen days at one time, nor be repeated until fourteen days have elapsed, and shall not exceed eighty-four days in one year.

This order shall become operative in the United States and contiguous Territories thirty days after its date, and elsewhere within the jurisdiction of the United States sixty days from its date.

THEODORE ROOSEVELT.

THE WHITE HOUSE,
*November 25, 1908.*

[1448726, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

J. FRANKLIN BELL,
*Major-General, Chief of Staff.*

OFFICIAL:

HENRY P. McCAIN,
*Adjutant General.*

# APPENDIX E

## GENERAL FORMS

### 1. Forms for Charges

Charge and specification preferred against Private A—— B——, Co. ——, —— U. S. Infantry.

ARTICLE 17

(*a*) CHARGE: "Selling clothing,[1] in violation of the 17th Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, did sell the following articles of his uniform clothing, issued to him, viz.: One (1) forage cap, value $——; one (1) overcoat, made, value $——; and one (1) blanket, woolen, value $——; total value of articles sold $——.

"This at ——, on the —— of ——, 19—."

C—— D——,
*Captain, —— Infantry,*
*Officer Preferring Charge.*

Witnesses:
1st Sergeant E—— F——, Co. ——, —— Infantry.
Private G—— H——, Troop ——, —— Cavalry.
Mr. I—— K——, citizen.

*or,*[2]

(*b*) "Losing accouterments, in violation of the 17th Article of War." [3]

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, did, through neglect, lose the following articles of his accouterments, issued to him, viz.: One (1) ——, value $——; and one (1) ——, value $——; total value of articles lost, $——.

"This at, on the —— of —— 19—."

[1] See ante, par. 724.

[2] The loss or sale of ammunition should be charged under the 62d A. W.

[3] If a soldier is known to have unlawfully disposed of his clothing or accouterments in a way not mentioned in the 17th Article, the charge should be laid under the 62d Article.

### ARTICLE 20[1]

CHARGE: "Behaving with disrespect toward his commanding officer, in violation of the 20th Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, did behave himself with disrespect toward his commanding officer, Captain C—— D——, —— U. S. Infantry, by (*here insert language or describe the conduct*).

"This at ——, on the —— of ——, 19—."

### ARTICLE 21[2]

(*a*) CHARGE: "Disobedience of orders,[3] in violation of the 21st Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, having received a lawful command from his superior officer, 2d Lieut. C—— D——, —— U. S. Infantry, to (*insert order*), did willfully disobey the same.

"This at ——, on the —— of ——, 19—."

*or,*

(*b*) "Striking his superior officer, in violation of the 21st Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, did strike his superior officer, 2d Lieut. C—— D——, —— U. S. Infantry, with (*here describe the offense*), the said lieutenant being in the execution of his office.

"This at ——, on the —— of ——, 19—.".

### ARTICLE 24[3]

CHARGE: "Disobedience of orders, in violation of the 24th Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, being present and taking part in a (quarrel, fray, *or* disorder) among enlisted men of ——, and having been duly ordered by (*insert name and rank of officer or non-commissioned offi-*

[1] See ante, par. 727.

[2] A non-compliance by a soldier with an order emanating from a contract surgeon, a dental surgeon, a veterinarian, or a non-commissioned officer is not an offense under this article, but one to be charged, in general, under the 62d. A simple neglect to comply with a standing order is an offense under the 62d Article, and not under the 21st, which implies a willful defiance of authority. See ante, par. 728.

[3] See ante, par. 731.

*cer*) into confinement (*or* arrest) did refuse to obey and did disobey said order.

"This at ——, on the —— of ——, 19—."

ARTICLE 32 [1]

CHARGE: "Absence without leave, in violation of the 32d Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, did absent himself from his company, without leave from his commanding officer, from ——, on the —— of ——, 19—, until ——, on the —— of ——, 19—.

"This at ——."

ARTICLE 33 [2]

(*a*) CHARGE: "Absence from parade, in violation of the 33d Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, not being prevented by sickness or other necessity, did fail to repair, at the fixed time, to the place of parade appointed by his commanding officer.

"This at ——, on the —— of ——, 19—."

*or,*

(*b*) "Absence from 11 p.m. inspection, in violation of the 33d Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, not being prevented by sickness or other necessity, did fail to repair, at the fixed time, to the place appointed by his commanding officer for 11 o'clock p. m. inspection of his company.

"This at ——, on the —— of ——, 19—."

ARTICLE 38 [3]

(*a*) CHARGE: "Drunkenness on duty, in violation of the 38th Article of War."

*Specification:* "In that Private A—— B——, Troop ——, —— U. S. Cavalry, while on duty on stable guard, was found drunk.

"This at ——, on the —— of ——, 19—."

*or,*

(*b*) "In that Private A—— B——, Co. ——, —— U. S. Infantry, while on duty at drill, was found drunk.

"This at, ——, on the —— of —— 19—."

[1] See ante, par. 739.
[2] See ante, par. 740.
[3] See ante, par. 745.

### ARTICLE 39[1]

(*a*) CHARGE: "Sleeping on post, in violation of the 39th Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, being on guard and posted as a sentinel, was found sleeping on his post.

"This at ——, on the —— of ——, 19—."

*or,*

(*b*) "Leaving post, in violation of the 39th Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, being on guard and posted as a sentinel, did leave his post before he was regularly relieved.

"This at,——, on the —— of —— 19—."

### ARTICLE 40[2]

CHARGE: "Quitting guard, in violation of the 40th Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, being on guard, did, without urgent necessity, quit his guard without leave from his superior officer.

"This at ——, on the —— of ——, 19—."

### ARTICLE 47[3]

(*a*) CHARGE: "Desertion, in violation of the 47th Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, a soldier in the service of the United States,[4] did desert the same at ——, on or about the —— of ——, 19—, and did remain absent in desertion until he was apprehended (*or* until he surrendered himself), at ——, on or about the —— of ——, 19—."

(*If a soldier deserts and enlists in another company, he should be charged with desertion under the 47th Article, and also with "fraudulent enlistment, to the prejudice of good order and military discipline,"*

[1] See ante, par. 746.
[2] See ante, par. 747.
[3] See ante, par. 754.
[4] This form is applicable either in case a soldier has "received pay" or has been "duly enlisted." In either case the "statement of service" will enable the court to determine as to the statute of limitation and proper punishment. See ante, par. 754.

*under the 62d.*[1] *An additional specification to the charge of desertion should set forth the offense as follows;)*

*Specification 2:* "In that Private A—— B——, Troop ——, —— U. S. Cavalry, alias Private C—— D——, Co. ——, —— U. S. Infantry, a soldier in the service of the United States, did desert the same at —— on or about the —— of ——, 19—, by enlisting under the name of C—— D——, in Co. ——, —— U. S. Infantry, without a regular discharge from said Troop ——, —— U. S. Cavalry.

ARTICLE 51[2]

CHARGE: "Advising (*or* persuading) a soldier to desert, in violation of the 51st Article of War."

*Specification:* "In that Private A—— B——, —— U. S. Infantry, did advise (*or* persuade) Private A—— B——, —— U. S. Infantry, to desert the service of the United States (*if desertion occurred, state the fact*).

"This at ——, on the —— of ——, 19—."

ARTICLE 58[3]

CHARGE: "Murder, in violation of the 58th Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, did in time of (war, insurrection, *or* rebellion) willfully, unlawfully, feloniously and with malice aforethought murder and kill —— —— by (*here set forth the manner of killing*).

"This at ——, on or about the —— of ——, 19—."

ARTICLE 60[4]

(*a*) CHARGE: "Causing to be presented to the United States authorities for payment a false and fraudulent claim against the United States, knowing such claim to be false and fraudulent, in violation of the 60th Article of War."

*Specification:* "In that 1st Lieut. A—— B——, —— U. S. Infantry, having duly assigned to —— —— and caused to be presented for payment to —— ——, Deputy Paymaster General, U. S. Army, by —— ——, his official pay account and claim against the United States for pay in full for the month of ——, 19—, amounting to the sum of —— ($——), and the same having been

[1] See 50th A. W., ante, par. 757. For form for fraudulent enlistment, see p. 501, post.
[2] See ante, par. 758.
[3] See ante, par. 765.
[4] See ante, par. 767.

duly satisfied and paid on such presentation, on or about ——, 19—, did subsequently cause to be presented for payment by his assignee, —— ——, to the said —— ——, Deputy Paymaster General, another, and a false and fraudulent, official pay account and claim against the United States for pay for the same month and in the same amount, he, the said Lieut. A—— B——, well knowing that this subsequent account and claim was false and fraudulent.

"This at ——, on or about the —— of ——, 19—."

(*b*) CHARGE: "Larceny, in violation of the 60th Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, did feloniously take, steal, and carry away ——, of the value of $——, the property of the United States, furnished and intended for the military service thereof.

"This at ——, on the —— of ——, 19—."

ARTICLE 61 [1]

CHARGE: "Conduct unbecoming an officer and a gentleman, in violation of the 61st Article of War."

*Specification* 1: "In that 1st Lieut. A—— B——, —— U. S. Infantry, having, for value received, assigned to —— —— his official pay account and claim for pay in full against the United States for the month of ——, 19—, which said account was made and executed by him in due manner and form, did, nevertheless, for a valuable consideration, assign to —— —— another and a second pay account and claim of the same nature and form, and for the same amount and period, he, the said Lieut. A—— B——, well knowing at the time he made such assignment that the second account and claim was false and fraudulent.

"This at ——, on or about the —— of ——, 19—."

*Specification* 2: "In that 1st Lieut. A—— B——, —— U. S. Infantry, having made and executed in due form his certain pay account as an officer in the army for the month of ——, 19—, and having duly assigned the said account to —— ——, thereby parting with all individual title and interest therein, and without having redeemed the same, and while it remained in full force and effect, did falsely certify with his official signature to the correctness of another official pay account for pay for the said month of ——, 19—, duly made, executed, and assigned to —— ——, which said certificate was in words as follows: 'I certify that the amount charged in the foregoing account is correct and just.'

"This at ——, on or about the —— of ——, 19—."

[1] See ante par. 768.

ARTICLE 62 [1]

(*a*) CHARGE: "Neglect of duty, to the prejudice of good order and military discipline."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, being on duty as ——, and it being his duty as such to ——, did fail and neglect to perform said duty.

"This at ——, on the —— of ——, 19—."

(*b*) CHARGE: "Drunkenness and disorderly conduct, to the prejudice of good order and military discipline."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, was drunk and disorderly in ——.

"This at ——, on the —— of ——, 19—."

(*c*) CHARGE: "Suffering a prisoner to escape, to the prejudice of good order and military discipline."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, while on duty as a sentinel, did, through neglect, suffer Private C—— D——, Co. ——, —— U. S. Infantry, a prisoner under his charge, to escape.

"This at ——, on the —— of ——, 19—."

*or,*

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, while on duty as a sentinel, did willfully suffer Private C—— D——, Co. ——, —— U. S. Infantry, a prisoner under his charge, to escape.

"This at ——, on the —— of ——, 19—."

(*d*) CHARGE: "Conduct to the prejudice of good order and military discipline."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, having received a lawful order from 1st Sergt. C—— D——, Co. ——, —— U. S. Infantry, the said sergeant being in the execution of his duty, to (*insert order*), did willfully disobey the same.

"This at ——, on the —— of ——, 19—."

(*If any person not a soldier* [2] *fraudulently enlist in the United States service, the charge and specification should read:* [3])

[1] See ante, par. 769.

[2] For case of fraudulent enlistment by a soldier, see p. 501, Form (*e*); and for definition of "fraudulent enlistment," see ante, par. 710.

[3] See ante, par. 710, and Sec. 3 of the Act of July 27, 1892, which is as follows:

"SEC. 3. That fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offense and made punishable by court-martial, under the 62d Article of War."

(*e*) CHARGE: "Fraudulent enlistment, in violation of the 62d Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, did, at ——, on the —— of ——, 19—, being then a minor, fraudulently enlist as a soldier in the service of the United States by falsely representing himself to be over 21 years, to wit, —— years and —— months of age; and that he has at ——, since said enlistment, received pay and allowances thereunder."

*or,*

(*f*) *Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, did, at ——, on the —— of ——, 19—, fraudulently enlist as a soldier in the service of the United States, by falsely representing that he had never been discharged from the United States service by sentence of a military court and by deliberately and willfully concealing from the recruiting officer, ——, the fact of his dishonorable discharge from ——, on ——, pursuant to sentence of court-martial; and that he has at ——, since said enlistment, received pay and allowances thereunder."

*or,*

if a soldier enlists without a discharge from a prior enlistment.[1]

(*g*) *Specification:* "In that Private A—— B——, Troop ——, —— U. S. Cavalry, alias Private C—— D——, Co.——, —— U. S. Infantry, a soldier in the service of the United States, did, without a discharge from said regiment of cavalry, fraudulently enlist in Co.——, —— U. S. Infantry, at ——, on the —— day of ——, 19—, under the name of C—— D——."

(*h*) CHARGE: "Manslaughter,[2] to the prejudice of good order and military discipline, in violation of the 62d Article of War."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, did unlawfully, willfuly and feloniously kill Private C—— D——, Co.——, —— U. S. Infantry, by (*here insert manner of killing*).

"This at ——, on the —— of ——, 19—."

(*i*) CHARGE: "Assault (*or*, assault and battery)[3] with intent to kill, to the prejudice of good order and military discipline."

*Specification:* "In that Private A—— B——, Co——, —— U. S. Infantry, did feloniously assault Sergeant —— ——, Co.——, —— U. S. Infantry, by shooting at him with a pistol (*or*, by stabbing him with a knife, *etc.*, *etc.*) with intent to kill.

"This at ——, on the —— of ——, 19—."

[1] In such cases it is not necessary to allege receipt of pay or allowance, as the soldier being already in the service, his enlisting again without a discharge is punishable as fraudulent enlistment without regard to the Act of July 27, 1892. See Dig. Op. J. A. G. sec. 1418.

[2] See ante, par. 769.

[3] If there be any unlawful touching of the person of another by the agressor himself or any other substance put in motion by him, battery should be charged. See ante, par. 769.

(*j*) CHARGE: "Burglary,[1] to the prejudice of good order and military discipline."

*Specification:* "In that Private A—— B——, Co.——, ——U. S. Infantry, did, in the night-time, break into and enter the quarters of 1st Lieut. C.—— D——, —— U. S. Cavalry, with intent to commit a felony, to wit: (*here describe the felony*).

"This at ——, about —— o'clock —.m., on the —— of ——, 19—."

(*k*) CHARGE: "Larceny,[2] to the prejudice of good order and military discipline."

*Specification:* "In that Private A—— B——, Co. ——, —— U. S. Infantry, did feloniously take, steal, and carry away ——, of the value of —— dollars ($——), the property of Corporal —— ——, Co. ——, —— U. S. Infantry.

"This at ——, on the —— of ——, 19—."

(*l*) CHARGE: "Embezzlement,[1] as defined in section 5488, Revised Statutes of the United States, in violation of the 62d Article of War."

*Specification:* "In that —— ——, U. S. Army, being the officer in charge for the United States of ——, and, as such officer in charge of said ——, being a disbursing officer of the United States, and having intrusted to him large amounts of public money of the United States, did willfully and knowingly apply for a purpose not authorized by law a large sum of the said moneys so intrusted to him, by willfully and knowingly causing the amount hereinafter named to be paid out of the said moneys which were subject to his order and control as such officer in charge of said ——, the account on which the same was paid being false, the amount paid not being due or owing from the United States to the party paid, or to any one, and he, the said —— ——, well knowing this to be the case; the said account, the amount paid, and the payment being that designated by the following voucher (and the entries therein and the indorsements thereon), submitted by the said —— —— with his accounts and marked 'Appropriation for ——.' Voucher No. ——, $——, dated ——, the said payment having been caused to be made on or about ——, by the said —— —— drawing and delivering a check, as such officer in charge of ——, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer.

"This at ——, on or about the —— of ——, 19—."

[1] See ante, par. 769.
[2] See ante, par. 769.

(*m*) CHARGE: "Perjury,[1] to the prejudice of good order and military discipline."

*Specification:* "In that Private A—— B——, Co.——, —— U. S. Infantry, having been duly sworn, at his own request, as a witness in his own defense before a —— court-martial, convened at ——, by —— order No. ——, dated ——, 19—, for his trial, did willfully, falsely, and corruptly testify as follows:

"Question by judge-advocate: —— ——?

"Answer: —— ——.

"Which testimony was false in that (*specify in what respects*), and which testimony was known by him, the said A—— B——, to be false, was material to the issue then being tried, and was given with intent to deceive the court.

"This at ——, on the —— of ——, 19—."

## 2. Statement of Service[2]

.....
(Surname.) (Christian name.)

.....
(Rank and organization.)

(*Statement of service required by paragraph* 962, *Army Regulations.*)

FORMER SERVICE

| Date of enlistment. | Date of discharge. | Character given on discharge. |
|---|---|---|
| | | |

Date of present enlistment —— ——, 19—.

Date of confinement under present charges ——, 19—.

—— ——,

—— ——,

—— —— (Station.) *Commanding* ——.

—— —— (Date.)

[1] See ante, par. 767, 769. Wharton says (Criminal Law, § 1259): "Perjury before courts-martial is by statute made indictable in most jurisdictions; but even where a statute does not apply, the weight of authority is that it is perjury at common law." It is a statutory crime, under Sec. 125, Act March 4, 1909, 35 St. L. 1111. So that false swearing before a court-martial, if it possesses the other elements of perjury, is perjury, and can be tried as such by court-martial under the 62d A. W. The rules of evidence in regard to perjury will then apply. When any of the elements of perjury are lacking the offense will properly be charged as "false swearing"; e.g., when the matter is *not* material to the issue.

[2] See par. 130, ante. When possible the name of the organization, or organizations, in which the soldier formerly served should be given.

### 3. Surgeon's Report on Alleged Deserter

FORT —— ——,
—— ——, 19—.

SIR: In compliance with par. 125, A. R., I have the honor to report that I have critically examined —— ——, an alleged deserter, and find him fit for service (*or*, unfit for service on account of ——).

To the Post Adjutant. ————,
*Surgeon.*

### 4. Record of a General Court-Martial [1]

SEC. I.—FORM FOR RECORD [2]

CASE 1

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[1] See "Record of proceedings", par. 379 et seq., ante. The record will be clear and legible, and, if practicable, without erasure or interlineation. Any erasure or interlineation made must be authenticated by the initials of the president or of the judge-advocate. In case the record is typewritten a copyable ribbon will be used.

[2] The pages of the record will be numbered at the bottom, and margins of 1 inch will be left at the top, bottom, and left side of each page.

[3] The index will refer to everything essential to the organization and

Proceedings[1] of a general court-martial which convened at ——, ——, pursuant to the following order:

*(Here insert a literal copy of the order appointing the court, and, following it, copies of any orders modifying the detail.)*[2]

HEADQUARTERS DEPARTMENT OF ——,
——, ——, 19—.

SPECIAL ORDERS, No. —.

A general court-martial is appointed to meet at ——, ——, at —— —.m., on —— ——, 19—, or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it.

DETAIL FOR THE COURT.

Major —— ——, 5th Cavalry.
Captain —— ——, Coast Artillery Corps.
Captain —— ——, Medical Corps.
1st Lieutenant —— ——, 10th Infantry.
1st Lieutenant —— ——, 5th Cavalry.
2d Lieutenant —— ——, Coast Artillery Corps.
2d Lieutenant —— ——, 10th Infantry.
1st Lieutenant —— ——, 5th Cavalry, judge-advocate.

*(If less than thirteen members are detailed, the order will state:)*

A greater number of officers can not be assembled without manifest injury to the service.

(Page 1.)

jurisdiction of the court and the regularity of its proceedings. It will also refer to the pages where each witness was sworn and recalled, and the pages where each document was introduced and appended.

[1] "Every party tried by a general court-martial shall, upon demand thereof, made by himself or by any person in his behalf, be entitled to a copy of the proceedings and sentence of such court." (114th A. W.) Applications for copies under this article will, when received by post or other commanders, be forwarded direct to the Judge-Advocate-General. (Par. 927, A. R.)

[2] Words inclosed in parentheses, ( ), or brackets, [ ], are simply explanatory, and will not be copied in the record.

(*In case travel is necessary, the following sentence will be added:*)

The journeys required in complying with this order are necessary for the public service.

By command of Brigadier General —— ——:

(Signed) ——— ———,
*Adjutant General.*

FORT —— ——,
——— ———, 19—.

The court met pursuant to the foregoing order at —— o'clock —.m.

PRESENT[1]

Major —— ——, 5th Cavalry.
Captain —— ——, Medical Corps.
1st Lieutenant —— ——, 10th Infantry.
1st Lieutenant —— ——, 5th Cavalry.
2d Lieutenant —— ——, Coast Artillery Corps.
1st Lieutenant —— ——, 5th Cavalry, judge-advocate.

ABSENT

Captain —— ——, Coast Artillery Corps.
2d Lieutenant —— ——, 10th Infantry.

(*If the cause of absence is known, it will be recorded; if unknown, it will be so stated*).[2]

The court then proceeded to the trial of Private —— ——, ——th Company, Coast Artillery Corps, who, having been brought before the court, stated that he did not desire counsel; (*or*) introduced —— —— as counsel.

[REPORTER.][3]

—— —— was duly sworn as reporter.[4]

(Page 2.)

[1] In the record of the proceedings of a court-martial, at its organization for the trial of a case, the officers detailed as members and judge-advocate will be noted by name as present or absent. In the record of the proceedings of subsequent sessions in the same case, the following form of words will be used, subject to such modifications as the facts may require: "Present, all the members of the court and the judge-advocate." When the absence of an officer who has not qualified, or who has been relieved or excused as a member, has been accounted for, no further note will be made of it.

[2] It is the duty of a judge-advocate to ascertain, if possible, the cause of absence. If a member is absent by order, the number and date of order will be given if the order emanate from the convening or higher authority; but if absent by telegraphic authority, a post order, etc., a copy of the authority should be appended to the record; if absent sick, a surgeon's certificate of sickness and inability to attend will be furnished by the absent member, and appended to the record.

[3] To facilitate use of form, subheads "reporter," "challenges," etc., are inserted and followed by marginal lines. To use form in case no reporter is employed, follow form to "reporter," and then omit as far as marginal line under "reporter" extends. In like manner omit when necessary for other subheads.

[4] The reporter must be sworn in each case. For form of oath, see ante, par. 162.

The order convening the court (and the order or orders modifying the detail, *if any*) was (*or* were) read to the accused, and he was asked if he objected to being tried by any member present named therein; to which he replied in the negative.

[CHALLENGES.]

(*or*) that he objected to —— —— on the following grounds:

(*Insert objections.*)

The challenged member stated:

(*Insert the statement of the challenged member, who should always be requested to respond to the challenge and inform the court upon its merits. Should the accused, after this statement, desire to put the challenged member upon his voir dire, the record should continue:*)

The accused having requested that the challenged member be sworn upon his *voir dire*,[1] —— —— was duly sworn by the judge-advocate, and testified as follows:[2]

The challenged member, the accused, (his counsel,) (the reporter,) and judge-advocate then withdrew,[3] and the court was closed, and on being opened the president announced in their presence that the objection of the accused was not sustained[4] (*or*) that the objection was sustained. —— —— then withdrew.

The accused was asked if he objected to any other member present;[5] to which he replied in the negative, (*or*) that he objected to —— —— on the following grounds:

(*Insert objection in full and record as before.*)

The members of the court and the judge-advocate were then duly sworn.[6]

[INTERPRETER.]

(*If an interpreter is required, he should now be sworn.*)[7]

(Page 3.)

[1] For form of oath, see ante, par. 167.

[2] The form of examination should be similar to that given for witness for the defense (see post, p. 510). The accused should first ask his questions, and then the judge-advocate and court such as they may deem pertinent.

[3] See ante, par. 167.

[4] In case of a tie vote, see ante, par. 376.

[5] Only one member at a time can be challenged, and a record of the proceedings in each case must be made.

[6] Whenever the same court-martial tries more than one prisoner on separate and distinct charges, the court will be sworn at the commencement of each trial and separate proceedings in each case prepared. For forms of oaths, see ante, par. 174.

[7] For form of oath, see ante, par. 165.

[DELAY.]

(*If delay is desired for cause known, application should now be made and the proceedings of the court recorded.*[1] *If no delay is requested, the record should continue:*)

The accused was then arraigned upon the following charges and specifications:[2]

CHARGE I: —— ——.

*Specification 1st:* —— ——.

*Specification 2d:* —— ——.

CHARGE II: —— ——.

[PLEA TO THE JURISDICTION, IN ABATEMENT OR IN BAR.]

To which the accused submitted the following special plea to the jurisdiction (*or* in abatement, *or* in bar of trial):[3]

(*or*)

To which the accused pleaded as follows:

To the 1st specification, 1st charge: "Guilty;" (*or*) "Not guilty."

To the 2d specification, 1st charge: "Guilty;" (*or*) "Not guilty."

To the 1st charge: "Guilty;" (*or*) "Not guilty."

To the 1st specification, 2d charge: etc.

Sergeant John Jones, Co. ——, —— Infantry, a witness for the prosecution, was duly sworn, and testified as follows:

DIRECT EXAMINATION:

Questions by the judge-advocate:[4]

*Q.* Do you know the accused? If so, state who he is.

*A* I do; Private —— ——, ——th Company, Coast Artillery.

(*The succeeding questions of the judge-advocate and their answers should follow in order.*)[5]



[1] See ante, par. 176.

[2] The signature and rank of the officer preferring the charge is not a part of the charge and should not be copied into the record.

[3] If a special plea is made, the plea, the reply of the judge-advocate, and the action of the court thereon will be fully stated. See ante, par. 177 et seq.; post, p. 511, note 3.

[4] When considered desirable the first question may be as to the identity of the witness.

[5] The record should set forth fully all the *testimony* introduced upon the trial, the oral portion as nearly as practicable in the precise words of the witness. If the court should decide to expunge any part it will not be literally expunged or omitted from the record, but will not be thereafter considered as part of the evidence.

CROSS-EXAMINATION:

Questions by the accused:

*Q.* —— ——?

*A.* —— ——.

(*If the accused declines to cross-examine the witness the record should state:*)

The accused declined to cross-examine the witness.

REDIRECT EXAMINATION:

Questions by the judge-advocate:

*Q.* —— ——?

*A.* —— ——.

RECROSS EXAMINATION:

*Q.* —— ——?

*A.* —— ——.

EXAMINATION BY THE COURT;

*Q.* —— ——?

*A.* —— ——.

[OBJECTION TO QUESTION.][1]

Question by a member: ——?

To this question the accused (*or party objecting*) objected as follows:

(*Insert objection.*)

To which the member replied:

(*Insert reply.*)

The accused (his counsel,) (the reporter,) and judge-advocate withdrew, and the court was closed, and on being opened the president announced in their presence that the objection was sustained.

(*or*) was not sustained.

(*In the latter case the record should continue:*)

The question was then repeated by the judge-advocate as a question of the court.

*A.* —— ——.

(*If the court considers it necessary to hear the testimony of the witness read or the witness desires to have certain testimony read for correction the record will show the fact and the corrections, if any.*)[2]

(Page 5.)

[1] If a question, put by a member, is objected to by another member, the judge-advocate, or the accused, and the objection is sustained, it will be *recorded as a question by a member*, and *not* answered. If the objection is not sustained it will be *recorded as a question by the court*, repeated by the judge-advocate, and *must* be answered. If a question is objected to by any one, at any time during the trial, the above method of recording the action of the court will be followed.

[2] Should a witness be recalled and again placed on the stand, he will be reminded that he has been sworn in the case and is still under oath.

(*At the close of the prosecution the record should continue:*)

The judge-advocate announced that the prosecution here rested.

(*If the court adjourns to meet another day the record should continue:*)

The court then, at —— o'clock —.m., adjourned to meet at — o'clock —.m., on ——.

——— ———,
1*st Lieut.* ——— ———,
*Judge-Advocate.*[1]

FORT ——— ———,
——— ———, 19—.

The court met, pursuant to adjournment, at —— o'clock —.m.

PRESENT [2]

All the members of the court and the judge-advocate.[3]

The accused, his counsel, and the reporter were also present.

(*If the proceedings of the previous day are required by the court to be read, the fact will be recorded in the following form:*)

The proceedings of —— were read [4] and approved.

(*or*) corrected as follows:

(*In latter case, enumerate corrections, giving page and line on which they occur.*)

Corporal John Smith, Co. ——, —— Infantry, a witness for the defense, was duly sworn and testified as follows:

DIRECT EXAMINATION:

Question by the judge-advocate:[5] Do you know the accused? If so, state who he is.

*A.* ——— ———.

Questions by the accused:

*Q.* ——— ———?

*A.* ——— ———.

(*The examination should be conducted as in case of a witness for the prosecution, the judge-advocate cross-examining, and the accused, if he so desires, reexamining the witness.*)



[1] The judge-advocate should sign each day's proceedings (par. 988, A. R.).

[2] See p. 506, note 1, ante.

[3] If any member is absent, if not already accounted for, add except —— (*giving cause of absence, if known*).

[4] The reading of previous proceedings may be dispensed with, unless for special reason considered necessary by the court.

[5] Though this is a witness for the defense, the judge-advocate will ask the preliminary question for the purpose of determining his identification of the accused. When considered desirable, the first question may be as to the identity of the witness.

(*Should the accused wish to testify in his own behalf, the record will continue:*) [1]

The accused, at his own request, was duly sworn as a witness, and testified as follows:

Questions by the accused:

*Q.* —— ——?

*A.* —— ——.

(*The examination of the accused should be conducted in the same manner as that of any other witness.*)

(*If the accused has no other witness to call, the record should continue:*)

The accused had no further testimony to offer and no statement to make.

(*or*) having no further testimony to offer, made the following verbal statement in his defense.

(*or*) having no further testimony to offer, submitted a written statement in his defense, which was read to the court, and is hereto appended and marked A.[2]

(*or*) requested until —— o'clock —.m. to prepare his defense.

(*If the court takes a recess during the time asked for, the record will continue:*)

The court then took a recess until —— o'clock —.m.; at which hour the members of the court, the judge-advocate, the accused, his counsel, and the reporter resumed their seats.

(*Or, if the court has other business before it, the record may continue:*)

The court then proceeded to other business, and at —— o'clock —.m. resumed the trial of this case; at which hour, etc.

The accused submitted his defense, which was read to the court, and is hereto appended and marked B.[3]



[1] Should the accused not wish to testify in his own behalf, the fact may not be animadverted upon.

[2] All documents and papers made part of the proceedings, or copies of them, will be appended to the record, in the order of their introduction, after the space left for the remarks of the reviewing authority, and marked in such a manner as to afford easy reference. It is not necessary to encumber a record by spreading upon it documents or other writings, or matter excluded by the court. The record should simply specify the character of the writings and the grounds upon which they were ruled out.

[3] The statement of the accused, or argument in his defense, and all pleas to the jurisdiction in bar of trial or in abatement, when in writing, should be signed by the accused, referred to in proceedings as having been submitted by him, and appended to the record, whether he is defended by counsel or not.

The judge-advocate submitted the case without remark.
(*or*) replied as follows:[1]

(*Insert reply.*)

(*or*) submitted and read to the court a written reply, which is hereto appended and marked C.

The accused (his counsel,) (the reporter,) and judge-advocate then withdrew, and the court was closed and finds the accused, Private —— ——, ——th Company, Coast Artillery:

Of the 1st specification, 1st charge: "Guilty;" (*or*) "Not guilty."

Of the 2d specification, 1st charge: "Guilty, except the words '—— ——,' and of the excepted words Not guilty."

Of the 1st charge: "Guilty;" (*or*) "Not guilty;" (*or*) "Not guilty, but guilty of, etc., —— ——."

Of the 1st specification, 2d charge, etc.

[PREVIOUS CONVICTIONS WHEN ACCUSED IS FOUND GUILTY.]

(*If the accused is found guilty and the punishment is discretionary,*[2] *the record should continue:*)

The judge-advocate and accused were then recalled and the court opened, and the judge-advocate stated that he had no evidence of previous convictions to submit.

(*or*) read the evidence of —— previous convictions,[3] copies of which are hereto appended and marked D, E, etc.

(*If the accused has any statement to make in regard to his previous convictions, it will be recorded.*)

The accused (his counsel,) (the reporter,) and judge-advocate then withdrew, and the court was closed, and sentences him, Private —— ——, ——th Company, Coast Artillery, —— ——.

[NO PREVIOUS CONVICTIONS, OR ACCUSED ACQUITTED.]

(*If the punishment is not discretionary, or the accused is acquitted, the record, after the findings are stated, should continue:*)

And the court does therefore sentence him, etc.

(*or*) does therefore acquit him, Private —— ——, ——th Company, Coast Artillery.

(Page 8.)

[1] The judge-advocate is entitled by usage to sum up the case and present an argument at the conclusion of the trial, even though the accused declines to make argument or statement.

[2] See Appendix D.

[3] See Previous Convictions, ante, par. 301 et seq. When the proof produced is the copy furnished to the company or other commander, in accordance with par. 965, A. R., it will be returned to him and a copy of it attached to the record if the trial be by general, regimental, or garrison court-martial (par. 971, A. R.). The copy should be bound with the record, as an exhibit, by means of the margin provided for the purpose.

The judge-advocate was then recalled, and the court at —— —.m. proceeded to other business.
(*or*) adjourned until —— —.m., the —— inst.
(*or*) adjourned to meet at the call of the president.
(*or, on completion of the trial of the last case before the court*) adjourned *sine die.*

—— ——,
*Major* ——,
*President.*

—— ——,
1*st Lieut.* ——,
*Judge-Advocate.*[1]

(*At least two blank pages will be left after the adjournment, and before the exhibits, for the decision and orders of the reviewing authority.*)

FORM OF BRIEF

(*The papers forming the complete record will be fastened together at the top, and the record folded in four folds, and briefed on the first fold as follows:*)[2]

——— ———,
Private, Co. ——, ——.

Trial by general court-martial
at —— —— —— ——;
Commencing ———, 19—;
Ending ———, 19—.
*President:*
Major —— ——,
—— ——.
*Judge-Advocate:*
1st Lieut. —— ——,
—— ——.

## SEC. II.—FORM FOR REVISION OF RECORD[3]

FORT —— ——,
—— ——, 19—.

The court reconvened at —— o'clock —.m., pursuant to the following order:

(Page 9.)

[1] In case of the death or disability of the judge-advocate or president of the court, see ante, par. 381, and par. 988, A. R.

[2] When the record is completed, the judge-advocate will forward it without delay to the convening authority as an inclosure to the indorsement of the judge-advocate returning the original charges (par. 990, A. R.). See also ante, par. 412.

[3] See Revision of Record, ante, par. 415 et seq. The court is usually

(*Insert copy of order.*)
(*or*) pursuant to the following indorsements:
(*Insert copies of all indorsements.*)

PRESENT [1]

——— ———.

ABSENT

(*Insert names of absentees, and state cause of absence, if known.*)

The judge-advocate read to the court the foregoing order.
(*or*) the foregoing indorsement of the convening authority.[2]

The judge-advocate then withdrew, and the court was closed, and revokes its former findings and sentence, and finds the accused, etc.
(*or*) revokes its former sentence, and sentences the accused, etc.
(*or*) respectfully adheres to its former findings and sentence.
(*or*) amends the record by, etc.[3]

The judge-advocate was then recalled, and the court at ——— —.m., etc.

——— ———,
*Major* ———,
*President.*

——— ———,
1*st Lieut.* ———,
*Judge-Advocate.*

(*The record of revision will be appended to the original proceedings, following them immediately, before the exhibits, and the whole indorsed by the president of the court and forwarded to the convening authority.*)

(Page 10.)

reconvened by indorsement on the original record, returning it to the president of the court with the directions of the convening authority.

[1] If the findings and sentence are to be considered, all the members who voted on them should, if possible, be present. At least five members of the court, who acted upon the trial, must, and the judge-advocate should, be present at a revision; but it is in general neither necessary nor desirable that the accused should be present.

[2] The judge-advocate will also read any other indorsements there may be connected with the proceedings in revision.

[3] See ante, par. 417.

## 5. Record of a Summary Court

### SEC. I.—FORM FOR RECORD[1]

..... (Surname.) ..... (Christian name.)

.....Co....., ..... (Rank) (Regiment or corps)

Number of case ——.

RECORD OF SUMMARY COURT

Trial of the man named above by court appointed by —— Orders, No. ——, Headquarters ——, ——, 19—.

FORMER SERVICE

| Date of enlistment. | Date of discharge. | Character given on discharge. |
|---|---|---|
| | | |

Date of present enlistment, —— ——, 19—.

Rate of pay per month, ——.

In arrest or confinement under present charges since —— ——, 19—.

Dates and serial numbers of previous convictions with sentences within one year preceding commission of offense and during current enlistment: —— ——.

Charge: Violation —— Article of War.

*Specification:* In that he did —— ——.

Witnesses:

—— ——.
—— ——.
—— ——.

—— ——,
*Officer preferring charges.*

I hereby consent to trial by summary court on these charges.

—— ——,
—— *Co.* ——.

[1] Blank forms for summary court record and for monthly report of cases tried (Form No. 6, post), size 3¾ by 8½ inches, will be furnished by The Adjutant-General of the Army. The form for summary court record is also intended for use in furnishing copies of the record, the same to be certified to be "a true copy" by the commanding officer or adjutant.

Respectfully referred to the summary court for trial.
By order of —— ——.

—— ——,
*Adjutant.*

FINDINGS:
Of specification :—— ——.
Of charge :—— ——.
Sentence: —— ——.
Number of previous convictions considered, —— ——.

—— ——,
—— ——,
*Summary court.*

Approved —— ——, 19—.

—— ——,
—— ——,
*Commanding Officer.*

## SEC. II.—INSTRUCTIONS

(On back of form.)

The charges and data, as called for on pages 1 and 2 of this form, will be prepared in duplicate by the officer preferring the charges—one copy for completion as the record of trial, and the other as the copy for the company records, the latter to be certified to be "a true copy" by the commanding officer or adjutant.

Each case will be given a serial number in the order of trial, *by the trial officer*, and bound in its numerical order in a book of convenient size, each case, when completed, being added to the book by pasting or other method. Paper binding will be sufficient, a good quality of tough paper being used for this purpose.

Charges will be accompanied by the certified copies of previous convictions[1] on file with the company records. If the charges be referred to the summary court for trial, the copies will be returned to the company records immediately after trial. If the charges be referred to a garrison or regimental court-martial (this form being used as a charge sheet), the copies of previous convictions will accompany them, but will be returned to the company records immediately after trial. When the copies of previous convictions accompany charges referred to a general court-martial for trial they will be returned to the company records immediately after trial, and copies thereof, made and certified by the judge-advocate, will be attached to the record of trial.

[1] See par. 305, et seq., ante.

If the only officer present with a command sits as summary court no approval of sentence is required, but he will sign the sentence as such officer and affix the date of signature.[1]

This form is printed in copying ink, and when filled in on the typewriter a copyable ribbon will be used.

---

## 6. Monthly Report of Summary Court Cases

FORM FOR REPORT

.....

(Surname.) (Christian name.)

.....Co....., .....

(Rank.) (Regiment or corps.)

REPORT OF TRIALS BY SUMMARY COURT

At —— ——.

During the month of ——, 19—.

Number of case ——.

Charge: Violation —— Article of War.

Synopsis of specification or of specifications: —— ——.

Finding : —— ——.

Number of previous convictions considered, ——.

Rate of pay per month, ——.

Consent in writing to trial. (*"Yes" or "No"*)——.

Sentence: (*If mitigated, give sentence as mitigated only. Signature of trial officer not to be copied.*)

Date of approval or, if there be no approval, of sentence, —— ——, 19—.

INSTRUCTIONS

This report covers one case only and, with other reports covering the cases tried during the month, will be transmitted to department headquarters on the last day of the month for file (*after examination*) in the office of the judge-advocate of the department in alphabetical order under the name of party tried. At recruit depots and recruiting stations and other places exempted from the jurisdiction of commanders of territorial divisions and departments the reports will be forwarded directly to The Adjutant-General of the Army. After having been retained on file for two years the reports may be destroyed.

[1] Par. 966, A. R.

## 7. Record of a Garrison Court-martial[1]

SEC. I.—FORM FOR RECORD

CASE ——.

Proceedings of a garrison court-martial convened at ——, pursuant to the following order:

FORT —— ——,
—— ——, 19—.

ORDERS, }
No. ——. }

A garrison court-martial will convene at this post at —— o'clock a.m., on —— ——, 19—, or as soon thereafter as practicable, for the trial of (such persons as have refused to consent in writing to trial by summary court).[2]

DETAIL FOR THE COURT

Captain —— ——.
1st Lieutenant —— ——.
2d Lieutenant —— ——.
2d Lieutenant —— ——, judge-advocate.
By order of —— ——:

(Signed) —— ——,
1*st Lieutenant* ——,
*Adjutant.*

FORT —— ——,
—— ——, 19—.

The court met, pursuant to the foregoing order, at —— o'clock —.m.

PRESENT

Captain —— ——.
1st Lieutenant —— ——.
2d Lieutenant —— ——.
2d Lieutenant —— ——, judge-advocate.

The court then proceeded to the trial of Private —— ——, Company ——, —— Infantry, who, having refused to consent

[1] The form for record for a garrison court-martial differs from that for a general court-martial only in respect to the form of the order appointing the court. The form here given is that for a case in which a plea of "Guilty" is entered; if the prisoner pleads "Not guilty" or makes a special plea, the form for record of a general court will be followed.

[2] See ante, par. 76.

in writing to trial by summary court, was brought before the court, and having heard the order convening it read, was asked if he had any objection to being tried by any member named therein; to which he replied in the negative.

The members of the court and the judge-advocate were then duly sworn, and the accused was arraigned upon the following charge and specification:

CHARGE:[1] —— ——.

*Specification:* —— ——.

To which the prisoner pleaded:

To the specification, "Guilty."

To the charge, "Guilty."

(*In case testimony is taken, it is not recorded.*[2])

The judge-advocate announced that the prosecution here rested.

The prisoner stated that he had no testimony to offer or statement[3] to make.

The accused and judge-advocate then withdrew, and the court was closed and finds the accused, Private —— ——, Company ——, —— Infantry:

Of the specification, "Guilty."

Of the charge, "Guilty."

The judge-advocate and the accused were then recalled and the court opened; and the judge-advocate stated that he had no evidence of previous convictions to submit.

(*or*) read the evidence of —— previous convictions, copies of which are hereto appended and marked A, B, etc.

The accused and judge-advocate then withdrew, and the court was closed and sentences him, Private —— ——, Company ——, —— Infantry, etc.

The judge-advocate was then recalled, and the court at —— —.m., etc.

—— ——,
*Captain* ——,
*President.*

—— ——,
*2d Lieut.* ——,
*Judge-Advocate.*

[1] The signature of the officer preferring the charge will not be entered in the record.

[2] Par. 988, A. R. The record must give the names of witnesses examined, both for the prosecution and defense, and will state the fact as to their having been duly sworn. If the accused be sworn as a witness the record should show that it was at his own request.

[3] Statements and arguments will not be reduced to writing in the record.

(*A sine die adjournment will be added to the last case before the court, and the record of each case folded and indorsed in the same manner as that for a general court-martial.*)

SEC. II.—REMARKS ON THE RECORD

1. The decision and orders of the post commander, properly dated and over his official signature, will follow immediately after the sentence, *adjournment*, or other final proceeding of the court in the case.

2. "The complete proceedings of a garrison or regimental court, except when convened at recruit depots and recruiting stations and other places exempted from the jurisdiction of commanders of territorial divisions and departments by paragraph 187, will be transmitted without delay by the post or regimental commander to department headquarters. Where such courts were convened at recruit depots, recruiting stations, and other exempted places, the reports and records of such courts will be forwarded directly to the Adjutant-General of the Army." [1]

---

## 8. Record of a Regimental Court-martial [2]

CASE ——.

Proceedings of a regimental court-martial convened at ——, ——, pursuant to the following order:

FORT —— ——,
——, ——, 19—.

ORDERS, }
No. ——. }

A regimental court-martial will convene at this post at —— o'clock a.m., on ——, ——, 19—, or as soon thereafter as practicable, for the trial of (*such persons as have refused to consent in writing to trial by summary court*).[3]

DETAIL FOR THE COURT [4]

(*Complete record as in case of garrison court-martial.*)

[1] Par. 991, A. R.

[2] The form of record for a regimental court differs from that for a garrison or a general court only in respect to the order convening the court.

[3] See par. 78 ante.

[4] See par. 77 ante.

## 9. Proceedings of a Retiring Board [1]

*Proceedings of an Army retiring board convened at ——, by virtue of the following orders:*

SPECIAL ORDERS, No. ——. } WAR DEPARTMENT, WASHINGTON, ——, ——, 19—.

EXTRACT

* * * * * * * *

10. Under instructions from the President, and in accordance with Section 1246, Revised Statutes, an army retiring board is appointed to meet at ——, ——, from time to time, at the call of the president of the board, for the examination of such officers as may be ordered before it.

DETAIL FOR THE BOARD

Colonel —— ——, —— Infantry.
Lieutenant-Colonel —— ——, Adjutant General.
Major —— ——, Medical Corps.
Major —— ——, —— —— Infantry.
First Lieutenant —— ——, Medical Corps.
First Lieutenant —— ——, —— Infantry, recorder.

Such journeys as it may be necessary for the members and recorder of the board to make in attending its sessions and returning to their proper stations are necessary for the public service.

* * * * * * * *

BY ORDER OF THE SECRETARY OF WAR:

—— ——,
*Major-General, Chief of Staff.*

OFFICIAL:

—— ——,
*Adjutant General.*

——, ——, 19—.

The board met pursuant to the foregoing order at 11 o'clock a.m

PRESENT

Colonel —— ——, —— Infantry.
Lieutenant-Colonel —— ——, Adjutant General.
Major —— ——, Medical Corps.
Major —— ——, —— Infantry.
1st Lieutenant —— ——, Medical Corps.

[1] See ante, par. 486 et seq.

1st Lieutenant —— ——, —— Infantry, recorder.

Captain —— ——, ——, appeared before the board pursuant to par. ——, Special Orders No. ——, War Department, dated ——, 19—, and stated that he did not desire counsel; (*or*, introduced —— —— as counsel.)

The order convening the board was then read, and Captain —— —— was asked if he had any objection to offer to any member present; to which he replied in the negative.

(*or*) that he objected to —— —— on the following grounds:

(*Insert objections.*)

The challenged member stated:

(*Insert the statement of the challenged member, who should be requested to respond to the challenge and inform the board upon its merits. Should the officer before the board for examination desire to put the challenged member on his voir dire, the record should continue:*)

Captain —— ——, having requested that the challenged member be sworn[1] on his *voir dire*, —— —— was duly sworn by the recorder, and testified as follows:

Question by Captain —— ——:

* * * * * * * *

The board was then closed, and, on being opened, its decision was announced that the objection was not sustained, (*or*) that the objection was sustained. (*In the latter case the record should state that the challenged member then withdrew.*)

Captain —— —— was then asked whether he objected to any other member; to which, etc., as before.[2]

The members of the board and the recorder[3] were then duly sworn.

(*If the officer desires to be retired, the record will continue:*)

Captain —— —— was then asked whether he desired to be retired, and answered in the affirmative. He was then duly sworn as a witness, and testified as follows:

Question by the recorder (*or* by the board):

*Q.* Please state the nature of your disability and its cause, and how long you have suffered from it.

[1] For form of oath, see ante, par. 167.

[2] Five being, under Sec. 1246, R. S., the minimum number of members of a retiring board, it must, when reduced below that number by challenge, or if the board is left without the proportion of medical officers required by said section, adjourn and report the facts to the convening authority. When the board again meets, the officer being examined will be accorded the right of challenge as before.

[3] If there be a reporter, he will also be sworn. For form of oath, see ante, par. 162.

*A.* (*The officer can here make an oral statement or submit a written one. If a written statement is submitted the record will state:*)

The witness submitted a written statement, which was read to the board, and is hereto attached, marked A.

*Q.* Is the statement submitted by you correct?

*A.* Yes.

(*The board may then ask further questions.*)

*Q.* Do you desire to make any further statement?

*A.* ——.

(*When the officer objects to retirement, he will not be examined at this stage of the proceedings, but may introduce evidence or make a statement, as hereinafter indicated.*)

Major —— ——, surgeon, a member of the board, was then duly sworn, and testified as follows:

*Q.* Please submit to the board the result of your examination of Captain —— ——.

The witness submitted a written report signed by himself and Assistant Surgeon —— ——, also a member of the board, which was read to the board and is attached, marked B.

*Q.* From what cause does Captain —— ——'s disability proceed?

*A.* ——.

*Q.* Is the disability permanent?

*A.* ——.

*Q.* Is Captain ——'s disability such as to incapacitate him for active service?

*A.* ——.

* * * * * * * *

(*The examination of the witness should be conducted so as to bring out all material facts on the lines indicated.*)

Captain —— —— stated that he had no question to ask, (*or*) asked the following questions:

* * * * * * * *

(*The other medical member of the board should then be similarly interrogated.*)

The recorder then submitted certain papers referred to the board from the Office of The Adjutant General of the Army, which were read to the board and are attached, marked ——.

Captain —— —— had no further evidence to submit nor statement to make. (*When there is such evidence or statement, the record will duly set it forth.*)

The board was then closed for deliberation, and, having maturely considered the case, finds that Captain —— —— is incapacitated for active service and that the cause of said incapacity is ——.

And the board further finds that said incapacity is (*or* is not) an incident of service.

The board then adjourned.[1]

——— ———,
———,
*President of the Board.*[2]

——— ———,
———,
*Recorder.*

## 10. Forms for Sentences

In sentences imposing a loss of rank or files upon an officer the court may fix a place on the army list where the name of the accused will be placed as a result of the sentence, as, for instance, at the foot of the list of first lieutenants of infantry, or the court may mention the number of files to be lost, as, for instance, to lose ten files in military rank. In this case the court should not undertake to state where on the army list the name of the accused will appear.

Form 1. *Reduction:* . . . "to be reduced to the ranks."[3]

Form 2. *Confinement:* . . . "to be confined at hard labor,[4] under charge of the post guard, for ——— (—) days."

Form 3. *Forfeiture:* . . . "to forfeit ——— (—) dollars of his pay,[5] now due or to become due."[6]

[1] (*Or when the board wishes to hear the record read:*)
The board then adjourned to meet ——— at ——— o'clock —.m.

——— ———,
———,
*Recorder.*

SECOND DAY'S PROCEEDINGS.

——— ———, 19—.

The board met pursuant to adjournment.
Present: All the members and the recorder.
The foregoing proceedings were then read and approved.
The board then adjourned.

——— ———,
———,
*President of the Board.*

——— ———,
———,
*Recorder.*

[2] It is not necessary that the proceedings should be authenticated by the signatures of all the members of the board.

[3] See ante, par. 362, 363.

[4] Unless *hard labor* be imposed by a sentence it can not be required of the prisoner. See ante, par. 343.

[5] See ante, par 351. *Detention* of pay is no longer authorized; and under the acts of February 12, 1895 (28 Stat. L. 655), and March 16, 1896 (28 Stat. L. 60), pay can no longer be retained.

[6] By adding the words "now due or to become due" the pay rolls

Form 4. *Confinement and forfeiture:* . . . "to be confined at hard labor, under charge of the post guard, for —— (—) months, and to forfeit —— (—) dollars per month for the same period."

Form 5. *Dishonorable discharge and forfeiture of pay and allowances:*[1] . . . "to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him."

Form 6. *Dishonorable discharge, forfeiture of pay and allowances, and confinement:* . . . "to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor at such post (*or*, in such penitentiary) (*or*, at such place) as the reviewing authority may direct, for —— (—) years."

## 11. Summons for Military Witness[2]

——, ——, 19—.

*To* ——, ——.

You are hereby summoned to appear on the —— day of ——, 19—, at —— o clock —.m., before a general court-martial, convened at —— ——, by Special Orders, No. ——, Headquarters —— ——, dated —— ——, 19—, as a witness for the —— in the case of —— ——.

——, ——,

*Judge-Advocate of the Court-martial.*

## 12. Subpœna[3] for Civilian Witness

UNITED STATES *vs.* ——. } *Subpœna.*

*The President of the United States, to* —— ——, *greeting:*

You are hereby summoned and required to be and appear in person on the —— day of ——, 19—, at —— o'clock —.m., before a general court-martial of the United States, convened at —— ——, by Special Orders, No. ——, Headquarters —— ——, dated

will generally be simplified, by permitting all of the forfeiture to be collected at the next payment.

[1] See ante, par. 359.

[2] See ante, par. 213.

[3] Fees must be tendered or paid under Act of March 2, 1901. See ante, par. 214 et seq.

—— ——, 19—, then and there to testify and give evidence as a witness for the —— in the above-named case. And have you then and there this precept.

Dated at ——, this —— day of ——, 19—.

—— ——,
—— ——,
*Judge-Advocate of the Court-martial.*

## 13. Subpœna[1] Duces Tecum

(*Civilian witness.*)

UNITED STATES
*vs.*
—— ——. } *Subpœna.*

*The President of the United States, to* —— ——, *greeting:*

You are hereby summoned and required to be and appear in person on the —— day of ——, 19—, at —— o'clock —.m., before a general court-martial of the United States, convened at —— ——, by Special Orders, No. ——, Headquarters —— ——, dated —— ——, 19—, then and there to testify and give evidence as a witness for the —— in the above-named case; and you are hereby required to bring with you, to be used in evidence in said case, the following-described documents, to wit: —— ——. And have you then and there this precept.

Dated at ——, this —— day of ——, 19—.

—— ——,
—— ——,
*Judge-Advocate of the Court-martial.*

## 14. Subpœna for Civilian Witness

(*For deposition.*)[2]

UNITED STATES
*vs.*
—— ——. } *Subpœna.*

*The President of the United States, to* —— ——, *greeting:*

You are hereby summoned and required to be and appear in person on the —— day of ——, 19—, at —— o'clock —.m., before —— at —— ——, detailed to take your deposition for use before

[1] Fees must be tendered or paid under Act of March 2, 1901. See ante, par. 214 et seq.

[2] See ante, par. 251 et seq.

a general court-martial of the United States, convened at —— ——, by Special Orders, No. ——, Headquarters —— ——, dated —— ——, 19—, then and there to testify and give evidence as a witness for the —— in the above-named case. And have you then and there this precept.

Dated at ——, this —— day of ——, 19—.

—— ——,

—— ——,

*Judge-Advocate of the Court-martial.*

15. RETURN OF SERVICE

*(Indorsement of preceding writs.)*[1]

UNITED STATES

*vs.*

—— ——.

—— ——,

—— ——, 19—.

I certify that I made service of the within subpœna on —— ——, the witness named therein, by personally delivering to him in person a duplicate of the same at ——, on the —— day of ——, 19—.

—— ——.

—— ——, } *ss.*
—— ——, }

—— ——, being duly sworn, on his oath states that the foregoing certificate is true.

—— ——.

Subscribed and sworn to this —— day of ——, 19—, before me.[2]

—— ——,

—— ——.

---

## 16. Warrant of Attachment[3]

UNITED STATES }
*vs.* }
—— ——. }

*The President of the United States, to —— ——, greeting:*

WHEREAS, —— ——, of —— ——, was on the —— day of ——, 19—, at ——, duly subpœnaed to appear and attend at ——, ——, on the —— day of ——, 19—, at —— o'clock —.m., before a

[1] On the back of each form of writ are forms for both certificate and affidavit.

[2] After service, as above indicated, the original subpœna should be at once returned to the judge-advocate of the court; if the witness can not be found, the judge-advocate should be so informed.

[3] See ante, par. 221.

general court-martial duly convened by Special Orders, No. ——, dated Headquarters Department of ——, —— ——, 19—, to testify on the part of the —— in the above-entitled case; and whereas he has failed to appear and attend before said general court-martial to testify, as by said subpœna required, and whereas he is a necessary and material witness in behalf of the —— in the above-entitled case;

*Now, therefore,* by virtue of the power vested in me, the undersigned, as judge-advocate of said general court-martial, by Section 1202 of the Revised Statutes of the United States, you are hereby commanded and empowered to apprehend and attach the said —— ——, wherever he may be found within the —— of ——,[1] and forthwith bring him before the said general court-martial assembled at —— ——, to testify as required by said subpœna.

—— ——,
——,
*Judge-Advocate of said General Court-martial.*

Dated —— ——, —— ——, 19—.

## 17. Interrogatories and Deposition [2]

INTERROGATORIES

THE UNITED STATES
*vs.*
—— ——.

The following interrogatories and cross-interrogatories to be propounded under the 91st Article of War, to —— ——, stationed (*or* residing) [3] at —— ——, a witness for the prosecution (*or* defense) [3] in the above-entitled case now pending and to be tried before the general court-martial convened at —— ——, by paragraph ——, Special Orders No. ——, Headquarters Department of ——, dated —— —, 19—, are { accepted by the court in open / agreed upon by both parties in } session, the —— having been given reasonable opportunity to subadvance of the assembling of the court and subject to exceptions mit cross-interrogatories / when read in court } [4] and are respectfully forwarded to the

[1] State, Territory, or District where the court sits.

[2] See ante, par. 251 et seq.

[3] Erase the word inappropriate to the case. With the consent of the opposite party the deposition of a witness residing *within* the State, Territory, or District in which the court sits may be taken and read in evidence. A written stipulation signed by both parties should, in such a case, be attached to this paper before it is signed.

[4] Erase the line inappropriate to the case.

convening authority with the request that some suitable officer may be designated to take, or cause to be taken, the deposition of said witness thereon:

First interrogatory: Are you in the military service of the United States? If yea, what is your full name, rank, organization, and station? If nay, what is your full name, occupation, and residence?

Second interrogatory: Do you know the accused, a —— in —— ——? If yea, how long have you known him?

Third interrogatory: —— ——?

*Etc.*

First cross-interrogatory: —— ——?

*Etc.*

First interrogatory by the Court: —— ——?

*Etc.*

Dated at —— ——, this —— day of ——, 19—.

—— ——,
—— ——,
*Judge-Advocate.*

—— ——,
—— ——,
*President.*[1]

HEADQUARTERS DEPARTMENT OF ——,
—— ——, 19—.

—— ——, stationed (*or* residing)[2] at —— ——, is hereby designated to take, or cause to be taken, the deposition of the said —— ——, a witness on the part of the —— in the case of the United States against —— ——, now pending before a general court-martial at —— ——. The deposition, when taken, to be sent by him to —— ——, the president of said court at —— ——.

By command of —— General ——.

—— ——,
*Adjutant General.*

---

DEPOSITION.

—— ——, the witness above named, having been first duly sworn by me, —— ——, a [3] ——, stationed (*or* residing)[4] at —— ——, doth depose and say for full answers to the foregoing interrogatories, as follows:

[1] If taken in advance of the assembling of the court, the interrogatories should be signed by the judge-advocate and the accused instead of the president and judge-advocate.

[2] Erase the word inappropriate to the case.

[3] Insert official character: as "Trial Officer Summary Court," "Notary Public," etc.

[4] Erase the word inappropriate to the case.

To the first interrogatory: —— ——.
*Etc.*

—— ——.
(*Signature of witness.*)

Subscribed and sworn to before me this —— day of ——, 19—.

—— ——,[1]
—— ——.

I, —— ——, the officer designated to cause the deposition of the said —— —— to be taken on the foregoing interrogatories and cross-interrogatories, do certify that it was duly made and taken under oath.

—— ——,[2]
—— ——.

---

## 18. Account of Civilian Witness[3] Not in Government Employ

FORM 13A—PAY DEPARTMENT

Voucher No. ——. Pay, 19—.

*The United States, to —— ——, Civilian witness, Dr.*

| | Dollars. | Cents. |
|---|---|---|
| From ——, 19—, to ——, 19—: | | |
| For mileage from —— to —— and return, being —— miles, at five cents per mile..... | ..... | ..... |
| For allowance while in attendance on said court, from ——, 19—, to ——, 19—, as per certificate of Judge-Advocate hereon, —— days, at $— per day... | ..... | ..... |
| Total..... | ..... | ..... |

[1] The jurat to be signed by the officer administering the oath, who will add his official designation. (See par. 256, ante.) If the oath is administered by a notary public, his seal will be affixed to the deposition.

[2] This certificate, regarded as the formal return, will be signed by the officer, civil or military, who has been designated to take or *cause* to be taken, the deposition; and will be signed by him whether or not he is the officer who administered the oath (G. O. 227, War Dept. 1909).

[3] The forms for "Summons for a military witness," for "Subpœnas for a civilian witness," for a "Warrant of attachment," and for a deposition are obtained from The Adjutant-General. The forms for accounts of civilian witnesses and of reporters are obtained from the Paymaster-General.

*(Certification and account to be completely filled in by Judge-Advocate, or before signature by Judge-Advocate, without alteration or erasure thereafter.)*

I certify that —— ——, a civilian not in Government employ, has been in attendance as a material witness from ——, 19—, to ——, 19—, inclusive, before a —— court-martial, duly convened at this place, and that he was duly summoned thereto from —— and was not furnished transportation by the Government for any portion of the journey.

(NOT TO BE SIGNED IN DUPLICATE.)

Place, ——
Date, ——.

—— ——,
—— ——,
*Judge-Advocate.*[1]

---

Paid by check No. ——, on ——, dated ——, 19—, for $——.

*(To be completely filled in before signature by payee without alteration or erasure thereafter.)*

Received ——, 19—, of ——, Paymaster, U. S. Army, *in cash* —— $\frac{}{100}$ dollars, in full of above account.

(NOT TO BE SIGNED IN DUPLICATE.)

—— ——, *Witness.*

*(The claimant will not sign the above receipt except when the payment is made in cash.)*

---

## 19. Account of Civilian Witness (by Deposition) not in Government Employ

FORM 13C—PAY DEPARTMENT

Voucher No. ——. Pay, 19—.

*The United States, to —— ——, Dr.*

| | Dollars. | Cents. |
|---|---|---|
| From ——, 19—, to ——, 19—: | | |
| For mileage from —— to —— and return, being —— miles, at five cents per mile..... | ..... | ..... |
| For allowance while in attendance, giving deposition for use before said court, from ——, 19—, to ——, 19—, as per certificate hereon, —— days, at $—— per day..... | ..... | ..... |
| Total..... | | ..... |

[1] If the witness be summoned for attendance before a summary court, the summary court officer will make the necessary certificate. (Digest Opin. J. A. G., sec. 2406.)

(*Certification and account to be completely filled in by officer, or before signature by officer, without alteration or erasure thereafter.*)

I certify that —— ——, a civilian not in Government employ, has been in attendance giving deposition for use of a court-martial convened under attached orders from ——, 19—, to ——, 19—, inclusive, and that he was duly summoned thereto from ——, and was not furnished transportation by the Government for any portion of the journey.

(NOT TO BE SIGNED IN DUPLICATE.)

Place, ——. —— ——,

Date, —— —— ——.

*Judge-Advocate or other commissioned officer.*

Paid by check No. ——, on ——, dated ——, 19—, for $——.

---

(*To be completely filled in before signature by payee without alteration or erasure thereafter.*)

Received ——, 19—, of ——, Paymaster, U. S. Army, *in cash* —— $\frac{}{100}$ dollars, in full of above account.

(NOT TO BE SIGNED IN DUPLICATE.)

—— ——, *Witness.*

(*The claimant will not sign the above receipt except when payment is made in cash.*)

## NOTES ON FORMS 13A AND 13C

The Paymaster is, under paragraphs 999 to 1003, Army Regulations, 1908, governed by the following rules in the treatment of voucher for travel expenses of civilian witnesses before military courts:

1. The voucher must be accompanied by authenticated copy of the order convening the court or appointing summary court.

2. The certificate of the judge-advocate or summary court officer (on face of voucher) is required in all cases.

3. A civilian not in Government employ, duly summoned to appear as a witness before a military court, or at a place where his deposition is to be taken for use before such court, will receive $1.50 a day for each day of actual attendance for such purpose, and 5 cents a mile from place of residence to place of trial or taking deposition, and return, except as follows:

Porto Rico and Cuba, $1.50 a day, 15 cents a mile for necessary travel by stage or private conveyance and 10 cents by railway or steamship line.

Alaska, east of one hundred and forty-first degree west longitude, $2 a day and 10 cents a mile; west of that degree, $4 a day and 15 cents a mile.

Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Washington, Oregon, Nevada, California, $3 a day, 15 cents a mile for necessary travel by stage or private conveyance, 5 cents by railway or steamship line, and $3 *a day for the time necessarily occupied in such travel.* (See A. R. 1000, amended by G. O. 128, 1908. Also R. S. 848; sec. 30, act June 6, 1900, 31 Stat. 332; act Mar. 2, 1901, 31 Stat. 954; act June 13, 1902, 32 Stat. 35; Regs. Att'y-Gen., July 21, 1902; act May 27, 1908, Public 141.)

A retired army officer is a civilian not in Government employ in contemplation of Army Regulation 1000. (10 Comp. 51.)

Civilian witnesses, not in Government employ, summoned to attend courts-martial in the Philippine Islands, are entitled to the per diem and mileage allowed witnesses in attendance upon United States courts, i.e., $1.50 per day for each day in attendance on the court, and 5 cents per mile for the distance traveled to and from the court. If furnished with transportation by the Government, 42.858 per cent of the 5 cents per mile will be deducted as cost of transportation furnished and 57.142 per cent allowed for subsistence and other expenses of the witnesses.

An employee of the civil government of the Philippine Islands, paid from insular funds, is not in the employ of the Government within the meaning of Army Regulation 999.

In case a witness duly subpœnaed before a general court-martial refuses to appear or qualify as a witness or to testify or produce documentary evidence as required by law, he will at once be tendered or paid by the nearest paymaster these fees and mileage and will thereupon be again called upon to comply with the requirements of law. Civilian witnesses will be paid by the Pay Department. (A. R. 1001.)

4. The certificate of the judge-advocate will be evidence of the fact and period of attendance and place from which summoned, and will be made on the voucher.

5. Upon execution of the certificate the witness will be paid upon his discharge from attendance, without awaiting performance of return travel. The charges for return journeys will be made upon the basis of the actual charges allowed for travel to the court.

No other items will be allowed.

6. Travel must be estimated by the shortest usually travelled route—by established lines of railroad, stage, or steamer—the time

occupied to be determined by the official schedules, reasonable allowance being made for unavoidable detention.

7. Whenever needed, judge-advocates can procure blank accounts for civilian witnesses from any army paymaster or the Paymaster-General's office. The accounts may then be made out upon the witness's discharge from attendance. If no paymaster be present at the place where the court sits, the accounts, authenticated as above directed, may be transmitted to any paymaster with confidence that the witness will receive his pay without unnecessary delay.

8. Accounts of citizen witnesses are not transferable. (See Circular 13, A. G. O., 1895.)

9. Signature of witnesses when signed by mark must be witnessed.

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## 20. Account of Civilian Witness in Government Employ

FORM 13B—PAY DEPARTMENT

Voucher No. ——. Pay, 19—.

*The United States, to —— ——, Civilian witness, Dr.*

| | | |
|---|---|---|
| From ——, 19—, to ——, 19—, For actual cost of travel from —— to —— and return, as per memorandum attached | ..... | ..... |
| For actual cost of meals and rooms while travelling to and from said court between above dates, inclusive, —— days | ..... | ..... |
| For actual cost of meals and rooms while in attendance on said court from ——, 19—, to ——, 19—, as per certificate of the Judge-Advocate hereon, —— days (see note 7, *post*) | ..... | ..... |
| Total | ..... | ..... |

I solemnly swear that the above account is correct; that I have not been furnished with Government transportation for any part of the journey for which travel fare is charged; and that the journey was performed without unnecessary or avoidable delay.

—— ——, *Witness.*

SWORN to and subscribed before me at ——, on this —— day of ——, 19—.

—— ——,

—— ——,

*Judge-Advocate.*

Paid by check No. ——, on ——, dated ——, 19—, for $——.

(*To be completely filled in before signature by payee without alteration or erasure thereafter.*)

Received ——, 19—, of ——, Paymaster, U. S. Army, in cash —— $\frac{}{100}$ dollars, in full of above account.

(NOT TO BE SIGNED IN DUPLICATE.)

—— ——, *Witness.*

*(The claimant will not sign the above receipt except when the payment is made in cash.)*

*(Certification and account to be completely filled in by Judge-Advocate, or before signature by Judge-Advocate, without alteration or erasure therafter.)*

I certify that —— ——, a civilian in Government employ, has been in attendance as a material witness from ——, 19—, to ——, 19—, inclusive, before a —— court-martial, duly convened at this place, and that he was duly summoned thereto from ——.

(NOT TO BE SIGNED IN DUPLICATE.)

—— ——,

—— ——,
*Judge-Advocate.*[1]

Place, ——.
Date ——. 19—.

NOTES ON FORM 13B

The Paymaster is, under paragraphs 999 to 1003, Army Regulations, 1908, governed by the following rules in the treatment of voucher for travel expenses of civilian witnesses before military courts:

1. The voucher must be accompanied by authenticated copy of the order convening the court or appointing summary court.

2. The affidavit of witness and judge-advocate's or summary court officer's certificate are required in all cases.

3. A retired army officer is a civilian not in Government employ in contemplation of Army Regulation 1000. (10 Comp. 51.)

In case a witness duly subpœnaed before a general court-martial refuses to appear or qualify as a witness or to testify or produce documentary evidence as required by law, he will at once be tendered or paid by the nearest paymaster these fees and mileage and will thereupon be again called upon to comply with the requirements of law. Civilian witnesses will be paid by the Pay Department. (A. R. 1001.)

4. The items of expenditure authorized in paragraphs 999 to 1003, Army Regulations, will be set forth in detail in a memoran-

[1] See note 1, page 529, ante.

dum which will be attached to each voucher. The correctness of the items will be attested by the affidavit of the witness, to be made, when practicable, before the judge-advocate.

5. The certificate of the judge-advocate will be evidence of the fact and period of attendance, and show place from which summoned, and will be made on the voucher.

6. Upon execution of the affidavit and certificate the witness will be paid upon his discharge from attendance, without awaiting performance of return travel. The charges for return journeys will be made upon the basis of the actual charges allowed for travel to the court.

No other items will be allowed.

7. Civilian witnesses *in* Government employ will receive as follows:

(*a*) Amount actually paid for cost of transportation or travel fare.

(*b*) Amount actually paid for cost of transfers to and from railway stations, not exceeding 50 cents for each transfer.

(*c*) Amount actually paid for cost of one double berth in sleeping car or on steamers where an extra charge is made therefor.

(*d*) The *actual cost* of meals and rooms at a rate *not exceeding* $3 per day for each day unavoidably consumed in travel or in attendance on the court.

8. Travel must be estimated by the shortest available usually travelled route; the charge for cost of travel—items (*a*), (*b*), (*c*)—by established lines of railroad, stage, or steamer should not exceed the usual rates in like cases; the time occupied to be determined by the official schedules, reasonable allowance being made for unavoidable detention.

9. The voucher, or the order for attendance, will be presumed to show in all cases, by indorsement or otherwise, if transportation in kind or commutation of rations has been furnished.

Transportation in kind will, for any distance covered thereby, be a bar to payment of item (*a*).

Indorsements of transportation furnished are scrutinized to ascertain if any part of item (*c*) has been included.

Commutation of rations will be a bar to payment of item (*d*).

Transportation and commutation of rations will be a bar to any payment.

10. No per diem allowance can be made where the attendance upon court does not require the witness to leave his station. (This applies only to civilians in Government employ.)

11. Compensation to civilians in or out of Government employ,

for attendance upon *civil courts*, is payable by the civil authorities. (A. R. 1004.)

12. If the witness is in Government employ the judge-advocate will state the fact. If it does not appear in the certificate or elsewhere in the papers, and is not known to the paymaster, it will be assumed that the witness is *not* in Government employ.

13. Whenever needed, judge-advocates can procure blank accounts for civilian witnesses from any army paymaster or the Paymaster-General's office. The accounts may then be made out upon the witness's discharge from attendance. If no paymaster be present at the place where the court sits, the accounts, authenticated as above directed, may be transmitted to any paymaster, with confidence that the witness will receive his pay without unnecessary delay.

14. Accounts of citizen witnesses are not transferable. (See Circular 13, A. G. O., 1895.)

15. Signature of witnesses when signed by mark must be witnessed.

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## 21. Account of Reporter

FORM 27—PAY DEPARTMENT

Voucher No. ——. Pay, 19—.

*The United States, to* —— ——, *Reporter, Dr.*

| Date. 19—. | | Dollars. | Cents. |
|---|---|---|---|
| | To services as a reporter before a —— —— convened at ——, pursuant to Special Orders, No. ——, Department ——, ——, 19—: | | |
| ..... | To —— hours before the....., at (Court, board, or commission.) | | |
| | $1 per hour..... | ..... | ..... |
| ..... | To —— words, at 15 cents per 100 words..... | ..... | ..... |
| ..... | To —— words, at 10 cents per 100 words..... | ..... | ..... |
| ..... | To —— words, carbon copies, at 2 cents per 100 words..... | ..... | ..... |
| ..... | To —— days in going to, in attendance on, and returning from said....., at (Court, board, or commission.) | | |
| ..... | $3 per day..... | ..... | ..... |
| ..... | To mileage for travel between —— and —— in going to and returning from the court, being —— miles, at — cents a mile..... | ..... | ..... |
| | Total..... | ..... | ..... |

(*Certification and account to be completely filled in by Judge-Advocate, before signature by Judge-Advocate, without alteration or erasure thereafter.*)

I CERTIFY that —— —— was employed by me as a reporter for a ——, under the annexed authority, and that the account for his services as stated above is correct and just.

(NOT TO BE SIGNED IN DUPLICATE.)

—— ——,
—— ——,
(*Judge-Advocate or Recorder.*)

Paid by check No. —— on ——, dated ——, 19—, for $——.

NOTES ON FORM 27—PAY DEPARTMENT

1. The method of employment of stenographic reporters for courts-martial, military commissions, or courts of inquiry, and their compensation as provided by paragraph 996, Army Regulations, amended by General Order 132, War Department, 1908, are as follows:

(*See paragraph* 996, *Army Regulations*, 1908, *as amended by the above order; ante, paragraph* 163 *and note* 3, *page* 84.)

2. Stenographic reporters for *retiring boards* can only be employed on the authority of the Secretary of War obtained in advance of the employment. The authority must be filed with the voucher on which payment is made. (Decision of the Secretary of War, April 24, 1879.)

3. The authority for the employment of a reporter for court-martial, court of inquiry, military commission, or retiring board, and for carbon copies of proceedings, must be filed with the voucher on which payment is made.

4. The mileage for a reporter is the same as is allowed for civilian witnesses not in Government employ, except that when Government transportation is furnished no mileage is allowed.

5. Copies of the order appointing court-martial, court of inquiry, military commission, or retiring board must be filed with the voucher.

## 22. Form for General Orders

HEADQUARTERS DEPARTMENT OF ——,
——, ——, 19—.

GENERAL ORDERS, }
No. ——. }

I. Before a general court-martial which convened at Fort ——, ——, pursuant to Special Orders, No. ——, Headquarters Department of ——, ——, 19—, were arraigned and tried ——.

1. "Private A—— B——, Troop ——, —— U. S. Cavalry, *alias* Private C—— D——, Co. ——, —— U. S. Infantry."

CHARGES

CHARGE I: "Desertion, in violation of the 47th Article of War."

*Specification 1:* "In that Private A—— B——, Troop ——, —— U. S. Cavalry, *alias* Private C—— D——, Co. ——, —— U. S. Infantry, a soldier in the service of the United States, did desert the same at —— on or about the —— of ——, 19—, and did remain absent in desertion until he was apprehended at ——, on or about the —— of ——, 19—."

*Specification 2:* "In that Private A—— B——, Troop ——, —— U. S. Cavalry, *alias* Private C—— D——, Co. ——, —— U. S. Infantry, a soldier in the service of the United States, did desert the same at —— on or about the —— of ——, 19—, by enlisting under the name of C—— D——, in Co.——, —— U. S. Infantry, without a regular discharge from said Troop ——, —— U. S. Cavalry.

CHARGE II.: "Fraudulent enlistment, in violation of the 62d Article of War."

*Specification:* "In that Private A—— B——, Troop ——, —— U. S. Cavalry, *alias* Private C—— D——, Co.——, —— U. S. Infantry, a soldier in the service of the United States, did, without a discharge from said regiment of cavalry, fraudulently enlist in Co. ——, —— U. S. Infantry, at ——, on the —— of ——, 19—, under the name of C—— D——."

PLEAS

To the 1st Specification, Charge I: "Not Guilty."
To the 2d Specification, Charge I: "Not Guilty."
To Charge I: "Not Guilty."
To the Specification, Charge II: "Not Guilty."
To Charge II: "Not Guilty."

FINDINGS

Of the 1st Specification, Charge I: "Guilty."
Of the 2d Specification, Charge I: "Guilty."
Of Charge I: "Guilty."
Of the Specification, Charge II: "Guilty."
Of Charge II: "Guilty."

SENTENCE

To be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor in the United States Military Prison, Fort Leavenworth, Kans., for —— (—) years.

ACTION [1]

The sentence in the foregoing case of Private A—— B——, Troop ——, —— U. S. Cavalry, *alias* Private C——, D——, Co. ——, —— U. S. Infantry, is approved and will be duly executed.

. . . . . .

By command of Brigadier General —— ——:

—— ——,
*Adjutant General.*

FORM A

## 23. Habeas Corpus by United States Court [2]

RETURN TO WRIT

*In re* —— ——. (*Name of party held.*)
(*Writ of habeas corpus—Return of respondent.*)
To the —— ——. (*Court or judge.*)

The respondent, Major —— ——, U. S. Infantry, upon whom has been served a writ of *habeas corpus* for the production of —— ——, respectfully makes return and states that he holds the said —— —— by authority of the United States as a soldier in the

[1] Where the sentence requires the confirmation of the President, the action of the convening authority and the confirmation of the sentence may be stated briefly, varying with the facts, substantially as follows:

"The finding of guilty of the —— specification, —— charge was disapproved by the convening authority. The sentence having been approved by him and the record of trial forwarded for the action of the President, under the 106th Article of War, the following are his orders thereon . . ."

*or* (*if there be no disapproval of any finding*).

"The sentence having been approved by the convening authority and the record of trial forwarded for the action of the President, under the 106th Article of War, the following are his orders thereon . . ."

[2] See ante, par. 226.

United States Army (*or* "as a military convict under sentence of general court-martial") under the following circumstances:

That the said —— —— was duly enlisted as a soldier in the service of the United States at ——, ——, on —— ——, 19—, for a term of —— years. (*If the offense is fraudulent enlistment this recital should be omitted.*)

(*Here state the offense. If it is fraudulent enlistment by representing himself to be of age, it may be stated as follows:*)

That on the —— day of ——, 19—, at ——, ——, the said —— ——, being then a minor, did fraudulently enlist in the military service of the United States for the term of —— years, by falsely representing himself to be over twenty-one years of age, to wit, —— years and —— months; and has, since said enlistment, received pay and allowances (*or either*) thereunder.

(*If the offense is desertion, it may be stated substantially as follows:*)

That the said —— —— deserted said service at ——, ——, on —— ——, 19—, and remained absent in desertion until he was apprehended at ——, ——, on —— ——, 19—, by —— ——, and was thereupon committed to the custody of the respondent as commanding officer of the post of ——.

The said —— —— has been placed in confinement (*or* "arrest," *as the case may be*), and formal charges have been preferred against him for said offense, a copy of which, duly certified and verified, is hereto annexed [1] and that he will be brought to trial thereon as soon as practicable before a court-martial to be convened by the commanding general of the Department of —— (*or* "convened by Special Orders, No. ——, dated Headquarters Department of ——, ——, 19—, a copy of which, duly certified and verified, is hereto annexed").[2]

(*If the party held is a military convict, the following paragraph should be substituted for the preceding paragraph:*)

[1] A copy of the charges will be certified by the post adjutant and sworn to before an officer authorized to administer oaths for military administration, in the following form:

I hereby certify that the foregoing is a full and true copy of the original charges preferred against —— ——, and that the same are in the usual form of miltary charges, and conform to the rules regulating military procedure.

—— ——,
*Post Adjutant.*

Sworn to and subscribed before me this —— of ——, 19—.

—— ——,
*Judge Advocate of Court-martial.*
(Or "Trial Officer of Summary Court.")

(G. O. 221, War Dept. 1909.)

[2] A copy of the order convening the Court will be certified and verified in a similar manner to the copy of the charges. G. O. 221, War Dept. 1909.

That the said —— —— was duly arraigned for said offense before a general court-martial, convened by Special Orders, No. ——, dated Headquarters Department of ——, —— ——, 19—, was convicted thereof by said court, and was sentenced to be ——, which sentence was duly approved on the —— day of ——, 19—, by the officer ordering the court (*or* "by the officer commanding said Department of —— for the time being") as required by the 104th Article of War. A copy of the order promulgating said sentence, duly certified and verified,[1] is hereto attached.

In obedience, however, to the said writ of *habeas corpus* the respondent herewith produces before the court the body of the said —— ——, respectfully refers to the decisions cited in the annexed brief, and for the reasons set forth in this return prays this honorable court to dismiss the said writ.

—— ——,
*Major, —— U. S. Infantry.*

Dated ——, ——,
—— ——, 19—.

FORM B

## 24. Habeas Corpus by State Court[2]

RETURN TO WRIT

(*Make return as in case of writ by a United States court, except as to last paragraph, for which substitute as follows:*)

And said respondent further makes return that he has not produced the body of the said —— ——, because he holds him by authority of the United States as above set forth, and that this court (*or* "your honor," *as the case may be*) is without jurisdiction in the premises, and he respectfully refers to the decisions of the Supreme Court of the United States in Ableman v. Booth, 21 Howard, 506, and Tarble's Case, 13 Wallace, 397, as authority for his action, and prays this court (*or* "your honor") to dismiss the writ.

—— ——,
*Major, —— U. S. Infantry.*

Dated ——, ——,
—— ——, 19—.

[1] A copy of the order publishing the sentence will be certified and verified in a manner similar to that of the copy of the charges. See ante, p. 535, note 1; G. O. 221, War Dept, 1909. [2] See ante, par. 227.

## 25. Instructions as to Returns to Writs of Habeas Corpus.

The following instructions in regard to returns under paragraphs 1008 and 1009, Army Regulations, in the cases of soldiers who have committed military offenses and are held for trial or punishment therefor, and of military convicts, are for the information and guidance of all concerned:

1. The return under paragraph 1009, Army Regulations, will be made in accordance with Form A (see ante, No. 23), and will refer, as in last paragraph of that form, to the brief of authorities which follows these instructions, and a copy of that brief will be annexed to the return. Should the court order the discharge of the party, the officer making the return, or counsel, should note an appeal pending instructions from the War Department, and he will report to The Adjutant General of the Army the action taken by the court and forward a copy of the opinion of the court as soon as it can be obtained.

2. The return under paragraph 1008, Army Regulations, will be made in accordance with Form B (see ante, No. 24), but a copy of the brief of authorities is not intended to be attached to the returns to writ of *habeas corpus* issuing from a State court.

## 26. Brief to be Filed with Return to a Writ of Habeas Corpus Issued by United States Court in Case of a Soldier whose Discharge is Sought under Section 1117, Revised Statutes

If a minor sixteen years old or over claims to be twenty-one years of age or over and enlists without the consent required by Section 1117, Revised Statutes, the contract of enlistment is not voidable by the minor, nor by his parents or guardian, if at the time of the filing of the petition the soldier is held in pursuance of a sentence of a court-martial, or any step has been taken with a view to bringing him before such court.

### 1. Contract not voidable by minor[1]

(*a*) *When soldier is not in confinement.*—United States *ex rel.* Wagner v. Gibbon, 24 Federal Reporter, 135. In this case Wagner, becoming "tired of the service," sought his discharge from the Army "solely on the ground of minority at the time of enlistment." This the court refused to grant, holding that Section 1117, Revised Statutes, "was made for the exclusive benefit of parents and guardians," and that, quoting from the syllabus—

[1] See ante, par. 710.

A minor over sixteen years of age, who at the time of his enlistment makes affidavit that he is twenty-one years of age, will not, on his own application, be released on *habeas corpus* on the ground that he was a minor at the time of his enlistment, and that the written consent of his guardian was not obtained.

(*b*) *When soldier is in confinement.*—*In re* Morrissey, 137 United States, 157; *In re* Grimley, 137 United States, 147; *In re* Wall, 8 Federal Reporter, 85; *In re* Davison, 21 Federal Reporter, 618; *In re* Zimmerman, 30 Federal Reporter, 176; *In re* Hearn, 32 Federal Reporter, 141; *In re* Spencer, 40 Federal Reporter, 149; *In re* Lawler, 40 Federal Reporter, 233; Solomon v. Davenport, 87 Federal Reporter, 318.

In the Morrissey case the Supreme Court of the United States settles this beyond question. Morrissey, a minor of seventeen years of age, enlisted without the consent of his mother, who was living. He deserted, remained in concealment until he reached his majority, and then presented himself before a recruiting officer and demanded his discharge from the Army on the ground that he was a minor when enlisted. The court said that the provision of Section 1117, Revised Statutes—

is for the benefit of the parent or guardian, * * * but it gives no privilege to the minor. * * * An enlistment is not a contract only, but effects a change of status. It is not, therefore, like an ordinary contract, voidable by the infant. * * * The contract of enlistment was good so far as the petitioner is concerned. He was not only *de facto*, but *de jure*, a soldier—amenable to military jurisdiction.

All the cases cited are instructive as illustrative of the different circumstances under which this principle has been declared.

In the Lawler case the deserter was arrested and "held as such awaiting trial, which will be as soon as a court-martial can be convened and organized for that purpose."

In the case of Solomon v. Davenport, the deserter was held by a sheriff under a warrant of a United States commissioner.

In the Spencer case the court said:

The authorities which have been read to me seem to establish very conclusively this rule:—that the enlistment of a minor is voidable, not necessarily void; and that he does really become by such enlistment, although under age, engaged in the service of the United States, and subject to the power and jurisdiction of the military authorities; and, such being the case, the court-martial had jurisdiction to arrest and try him for the charge of desertion.

2. CONTRACT NOT VOIDABLE BY PARENTS OR GUARDIANS IF THE SOLDIER IS HELD PURSUANT TO A SENTENCE OF A COURT-MARTIAL OR ANY STEP HAS BEEN TAKEN WITH A VIEW TO BRINGING HIM BEFORE SUCH COURT

*In re* Kaufman, 41 Federal Reporter, 876; *In re* Dohrendorf *et al.*, 40 Federal Reporter, 148; *In re* Cosenow, 37 Federal Reporter,

668; *In re* Dowd, 90 Federal Reporter, 718; *In re* Miller, 114 Federal Reporter, 838; U. S. v. Reaves, 126 Federal Reporter, 127; *In re* Lessard, 134 Federal Reporter, 305; *Ex parte* Anderson, 16 Iowa, 595; McConologue's Case, 107 Massachusetts, 170.

In the Kaufman case the father sought the discharge of his son, who was held by the military authorities and had been ordered before a military court for trial as a deserter. Quoting from the syllabus:

A minor who enlists in the United States Army upon his representation that he is of age, and receives pay and clothing and afterwards deserts and is arrested as a deserter, and at the time of his petition is held by the United States awaiting trial by a court-martial for the crime of desertion, will not be released under a writ of *habeas corpus* upon the ground that being a minor his enlistment was unlawful and contrary to the Revised Statutes of the United States.

In the Cosenow case the minor swore that he was twenty-one years and seven months old at the time of enlistment. He deserted, and at the time of the filing of the petition was held in custody awaiting the action of the reviewing authority on the proceedings of the court-martial. His father sought the discharge of his son on the ground of infancy at the time of enlistment. The court refused to discharge him, holding that "an enlistment contrary to law is not void, but voidable"; that the court-martial had jurisdiction of the offense, and the soldier " must be remanded to await the result of his trial."

The Dowd case arose on the application of the mother for the release of her son, who was held under sentence of a summary court. The court held, quoting from the syllabus:

The enlistment of a minor in the Army without the consent of his parents or guardian, required by Revised Statutes, Section 1117, is not void, but voidable only, and while he remains in the service under such enlistment the minor is amenable to the Articles of War, and can not be remanded to the custody of his parents by a civil court on a writ of *habeas corpus* while undergoing a sentence imposed on him by a court-martial for a violation of such Articles.

In the Anderson case it appears that a minor enlisted without his father's consent, and being held for trial before a court-martial for desertion, his father sought his discharge on *habeas corpus*. The court refused to discharge the soldier, saying "he must abide by the decision of the latter court (court-martial) before the question of the validity of his enlistment can be determined in the civil courts on *habeas corpus*."

In McConologue's Case the court said:

A minor's contract of enlistment is indeed voidable only and not void, and if, before a writ of *habeas corpus* is sued out to avoid it, he is arrested on charges of desertion, he should not be released by the court while proceedings for his trial by the military authorities are pending.

By Act of July 27, 1892, "fraudulent enlistment, and the receipt of any pay or allowance thereunder, is . . . declared a military offense and made punishable by court-martial under the 62d Article of War." A minor who procures his enlistment by representing himself to be over age commits this offense, and the statute authorizes his punishment therefor. In general it may be stated that where a minor has committed a military offense the interests of the public in the administration of justice are paramount to the right of the parent and require that the soldier shall abide the consequences of his offense before the right to his discharge be passed upon. (Digest Opin. J. A. G., Sec. 1258 and 1264, and notes.)

The soldier should not be allowed to escape punishment for his offense, even though his parents assert their right to his services. A minor in civil life is liable to punishment for a crime or misdemeanor, even though his confinement may interfere with the rights of his parents. *In re* Miller (114 Fed. Rep., 838) it was held that a minor sixteen years old or over "enlisting without the consent of his parents, on representation that he is of age, *becomes a soldier* amenable to military jurisdiction for military offenses, and subject to release from service only on application from his parents, *who can not prevent his court-martial for past military offenses.*" In the opinion of the court (page 842) it is said:

The common law, unaided by statute, fully recognizes the parents' right to the custody and services of their minor child; but it has never been held that they could, by the writ of *habeas corpus* or otherwise, obtain his custody and his immunity when he was held by an officer of a civil court of competent jurisdiction to answer a charge of crime. His enlistment having made the prisoner a soldier notwithstanding his minority, he is answerable to the military law *just as the citizen who is a minor is answerable to the civil law. The parents can not prevent the law's enforcement in either case.*

These views were cited with approval in U. S. v. Reaves (126 Fed. Rep., 127), where, upon full consideration of the authorities, the circuit court of appeals remanded Reaves, a minor who had deserted from the Navy, to the custody of the naval authorities as represented by the chief of police who had apprehended him.

# APPENDIX F

## TABLE OF CASES CITED


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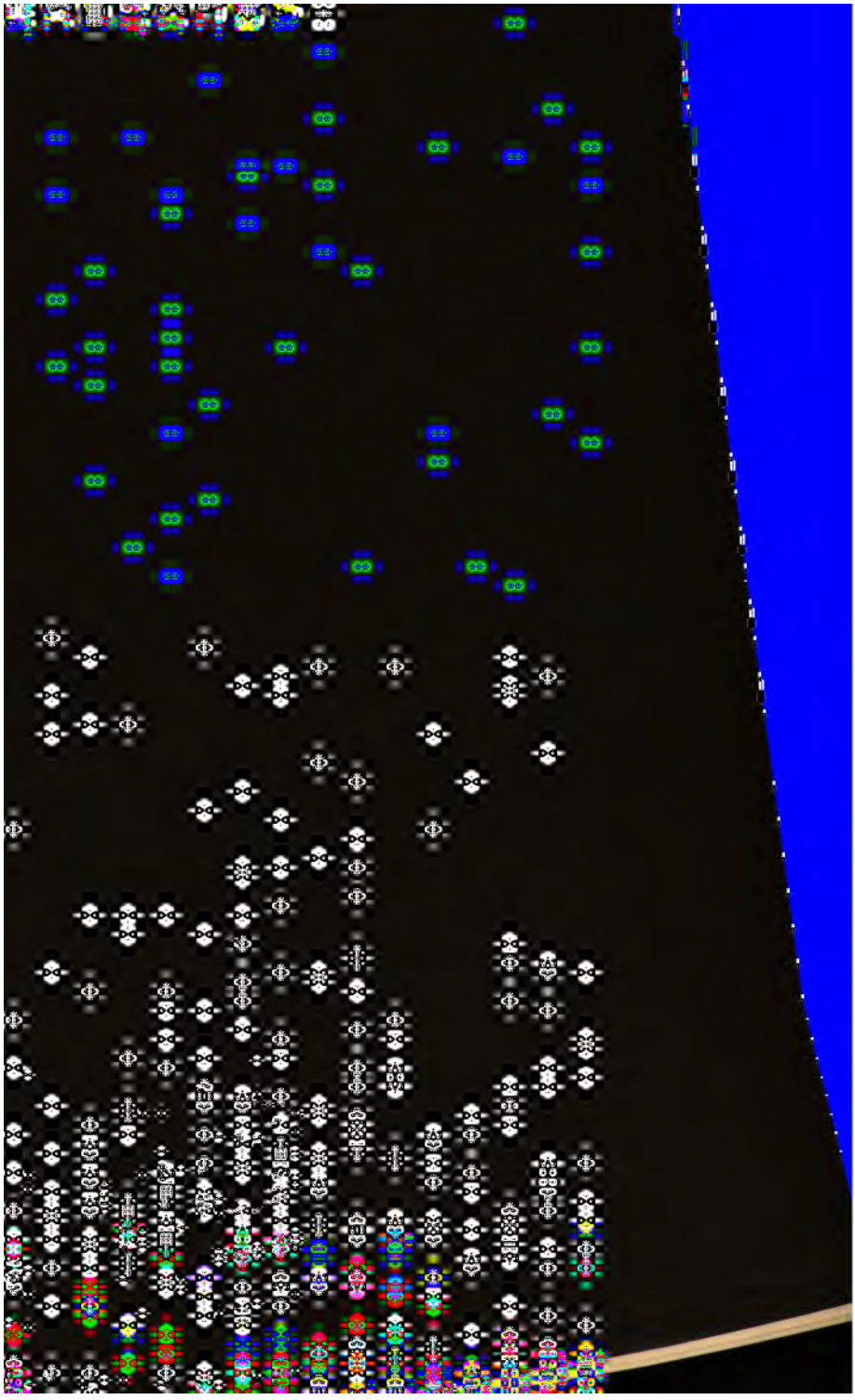
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